

There is no going back: The case for starting over with conditional sentences

by

Dawn North

M.A. (Criminology), Simon Fraser University, 2002

B.A. (Criminology), Simon Fraser University, 1986

Thesis Submitted in Partial Fulfillment of the
Requirements for the Degree of
Doctor of Philosophy

in the
School of Criminology
Faculty of Arts and Social Sciences

© Dawn North 2021
SIMON FRASER UNIVERSITY
Summer 2021

Copyright in this work rests with the author. Please ensure that any reproduction
or re-use is done in accordance with the relevant national copyright legislation.

Declaration of Committee

Name: Dawn North

Degree: Doctor of Philosophy

Thesis title: There is no going back: The case for starting over with conditional sentences

Committee:

Chair: Bryan Kinney
Associate Professor, Criminology

David MacAlister
Co-Supervisor
Associate Professor, Criminology

Cheryl Webster
Co-Supervisor
Professor, Criminology
University of Ottawa

Margaret Jackson
Committee Member
Professor Emerita, Criminology

Nicole Myers
Committee Member
Assistant Professor, Sociology
Queen's University

Andrew Heard
Examiner
Professor, Political Science

Anthony N. Doob
External Examiner
Professor Emeritus, Criminology
University of Toronto

Ethics Statement

The author, whose name appears on the title page of this work, has obtained, for the research described in this work, either:

- a. human research ethics approval from the Simon Fraser University Office of Research Ethics

or

- b. advance approval of the animal care protocol from the University Animal Care Committee of Simon Fraser University

or has conducted the research

- c. as a co-investigator, collaborator, or research assistant in a research project approved in advance.

A copy of the approval letter has been filed with the Theses Office of the University Library at the time of submission of this thesis or project.

The original application for approval and letter of approval are filed with the relevant offices. Inquiries may be directed to those authorities.

Simon Fraser University Library
Burnaby, British Columbia, Canada

Update Spring 2016

Abstract

The life of conditional sentences of imprisonment in Canada has been, to say the least, turbulent. Introduced in 1996, it was not long before restrictions were placed on their use—first in 2007 and then again in 2012. To add insult to injury, the sanction was found to have essentially failed in meeting its primary objective (of prison reduction) in two studies released in 2019. In many people’s minds, this less-than-stellar performance as a prison alternative signaled the inevitable end to this sentencing option. Yet, despite the many challenges, recent (2021) developments suggest that predictions of its imminent death may have been premature. Indeed, a resurrection of sorts may be on the horizon, brought about either through jurisprudence (*Sharma*) or legislation (Bill C-22). Having said this, any hope of long-term salvation will require serious analysis of its failings and deep reflection of workable remedies.

This study proposes to carry out this task. To this end, it employs a mixed-methods design (quantitative court and survey data as well as qualitative interviews with judges) to explore the use of conditional sentences in British Columbia, the province that appears to have had the least success in terms of using the sanction as a true prison alternative. The many challenges of conditional sentencing (e.g., flawed statutory construction, lack of public education, inadequate funding, etc.), are highlighted through a thematic analysis of the data. The phenomena of net-widening and circumvention are each explored as possible explanations for the apparent stability of imprisonment rates over the decades, notwithstanding dramatic swings in Canadian penal policy. Most notably, the application of conditional sentences to offenders who would not otherwise have been facing jail is linked to a rejection of the sanction as a term of imprisonment and/or its appeal as a form of “robust probation.” The future of conditional sentencing in Canada is considered and an argument is made that simply removing the restrictions introduced in 2012 fails to acknowledge or address the sanction’s many flaws. Indeed, if the challenges of conditional sentencing are not resolved, there may be little reason to believe that the sanction will fare any better than it did in its earlier (pre-2007/2012) life.

Keywords: restraint; sentencing; conditional sentence; prison alternatives;
circumvention

Acknowledgements

I would like to express my sincere gratitude to the judges I interviewed for this study. They were, without exception, incredibly generous with both their time and knowledge. Without them, this study would not have been possible. I also want to thank the Court Services Branch (Victoria, BC) for their assistance in providing access to court records. I am particularly grateful to both Louise Turner and Mike Scarrow for their breadth of knowledge and endless patience.

In my effort to produce a thesis that was relevant to real world events I engaged with countless frontline players, including prosecutors, defence counsel, court staff, and policy makers. These conversations informed many of the methodological and analytical decisions taken as part of this process, and hopefully contributed to a product that speaks in a meaningful way to these groups. I am thankful for each one of them.

I would also like to acknowledge the members of my supervisory committee for the support and guidance they provided throughout this process. First and foremost, I am indebted to my co-supervisor—Cheryl Webster—who showed me how to be a better researcher, a better writer, and, in many ways, a better person. Her meticulous reviews and thoughtful suggestions helped me to convert the proverbial sow's ear into a silk purse. I am also grateful for the ongoing encouragement provided by my co-supervisor, David MacAlister. With no less gratitude, I also wish to recognize the other members of my committee. Nicole Myers was exceedingly generous with her time and expertise, and I will always treasure our long talks, on and off topic. Margaret Jackson's faith in my ability to complete the doctoral program and this thesis was a constant source of inspiration to me. I wish to also thank my external examiners, Tony Doob and Andrew Heard. Your interest in my work and your thoughtful questions and comments at my defence made the experience both memorable and unexpectedly enjoyable.

Table of Contents

Declaration of Committee	ii
Ethics Statement	iii
Abstract	iv
Acknowledgements	v
Table of Contents	vi
List of Tables	ix
List of Figures	x
List of Acronyms	xi
Quotation	xii

Introduction – The resurrection of the conditional sentence? The Ontario Court of Appeal reopens the debate..... 1

Overview – How did we get here?	2
The current study	7

1 Restraint in the use of imprisonment..... 11

1.1 Restraint as a historically entrenched belief in Canada	11
1.2 Foundations for our longstanding belief in restraint	20
1.2.1 The ineffectiveness of prison as a crime reduction strategy	21
1.2.2 The incongruence of an over-reliance on imprisonment with Canadian social values	28
1.2.3 The financial cost of imprisonment	32
1.3 Manifestations of restraint and trends of imprisonment	35

2 The rise (and fall) of the conditional sentence 41

2.1 The beginning: The emergence of the conditional sentence as a strategy for prison reduction	42
2.1.1 Bill C-41 and the creation of conditional sentences	43
2.1.2 False starts: Yellow lights on the dashboard	47
2.1.2.1 Theoretical/conceptual [birth] defects and growing pains	48
2.1.2.2 Practical/operational challenges	57
2.2 The end of the beginning: The Supreme Court of Canada steps in	63
2.2.1 Conflicting interpretations at the appellate court level	64
2.2.2 Settling the immediate conflict: The <i>Proulx</i> decision	66
2.2.3 The ‘red lights’ of post- <i>Proulx</i> challenges (2000-2012)	68
2.2.3.1 Proulx’s double-edged sword	69
2.2.3.2 The cost of inadequate resourcing – credibility and public support	71
2.3 The beginning of the end: A totally predictable and completely foreseeable outcome	75
2.3.1 Yet more efforts to salvage CSOs – bites and caps	75
2.3.2 Growing pressure to introduce legislative restrictions	79
2.3.3 The Safe Streets and Communities Act (2012) - Bill C-10	82

2.4	The end?: Bill C-10 and the mystery of continued stability in Canada's imprisonment rates.....	84
2.4.1	Recent evaluations: Expected and unexpected findings	85
2.4.2	A way forward: Other ways of gaining knowledge.....	90
3	Methodology.....	93
3.1	Research design.....	93
3.2	Data sources	96
3.2.1	Adult court sentencing data (BC) – sentences – breaches – conditions.....	96
3.2.1.1	Sentence outcomes - dataset 1 – single charge cases	99
3.2.1.2	CSO breaches - dataset 2	104
3.2.1.3	Optional conditions - dataset 3 – conditional sentences vs suspended sentences	107
3.2.2	Survey and interviews with Provincial Court Judges (BC).....	108
3.2.2.1	Survey (40 participants).....	108
3.2.2.2	Interviews (24 participants).....	110
3.3	Data analysis.....	111
3.3.1	Court datasets – sentences – breaches – conditions	111
3.3.2	Survey	117
3.3.3	Interviews	118
3.4	Limitations – the perfect is the enemy of the good	120
4	Results – making sense of it all.....	123
4.1	Descriptive presentation and analyses	123
4.1.1	Court datasets	123
4.1.1.1	BC sentence trends 2006-2017 (dataset 1)	124
4.1.1.2	CSO breaches (2011 – 2016) – dataset 2	135
4.1.1.3	Optional conditions – dataset 3 - CSO vs SS (2011 vs 2017)	137
4.1.2	Survey and interview participants	144
4.1.2.1	Demographics	144
4.1.2.2	Incorporating survey and interview responses	145
4.2	Thematic Analyses	146
4.2.1	Net-widening	146
4.2.1.1	The push	148
4.2.1.2	The pull	164
4.2.1.3	'The Proulx'	173
4.2.2	Up-tariffing.....	177
4.2.3	Circumvention.....	180
4.2.3.1	Judicial response to Bill C-10: The evidence	181
4.2.3.2	Judicial response to Bill C-10: The rationales	193
4.2.3.3	Judicial response to Bill C-10: The imprimatur of the Court of Appeal.....	200
4.3	Summary of key findings	207

5	Discussion – the circle that cannot be squared	210
5.1	Are conditional sentences mortally wounded as tools for prison reduction, or can they be saved?	211
5.1.1	Learning from the experience of other countries	216
5.2	The Ontario Court of Appeal elevates the debate	221
5.2.1	The potential impacts of <i>Sharma</i> – options for the SCC.....	224
5.3	The bigger picture – reconsidering judicial roles and the purposes & principles of sentencing.....	228
5.3.1	Judges as protectors of society	229
5.4	The future of conditional sentencing	238
	Conclusions.....	243
	Limitations and future research	243
	Where do we go from here?	245
	References.....	259
Appendix A.	Timeline of key events (legislation/cases)	278
Appendix B.	Conditional Sentence of Imprisonment – s. 742.1	279
Appendix C.	Validation of court dataset.....	282
Appendix D.	Online survey – text.....	284
Appendix E.	Interview – Form B - Information & consent form	288
Appendix F.	Interview schedule for judges	289
Appendix G.	BC – Provincial Incarceration Rate (1990-2018).....	291

List of Tables

Table 2-1	Impact of CSOs on sentenced admissions to custody (1996 to 1998)....	55
Table 3-1	Description of BC court datasets (3).....	97
Table 3-2	JUSTIN codes – primary sentence and coding options	103
Table 3-3	JUSTIN codes - conditional sentence breach outcomes.....	106
Table 3-4	Specific offences selected for analysis	112
Table 3-5	Example - coding survey responses.....	118
Table 4-1	Number of cases by calendar year (2006 to 2017) - dataset 1	124
Table 4-2	Top ten offences (single charge cases) – dataset 1	125
Table 4-3	Conditional sentences – sentence length (n=15,591).....	134
Table 4-4	Conditional sentences & breaches by year 2011 to 2016	135
Table 4-5	Judicial response to admitted or proven CSO breach.....	137
Table 4-6	Red Zone study – conditions - CSOs & probation (2005 to 2012)	138
Table 4-7	Conditional sentences vs suspended sentences (n=736).....	139
Table 4-8	Conditional sentences vs suspended sentences – use of house arrest, curfew, and community work service (CWS)	143
Table 4-9	Survey and interview participants - status, region, years as a judge.....	145
Table 4-10	BC survey results - 1998 vs 2018 - sentencing objectives.....	153
Table 4-11	Survey responses - "what more is needed?" (Q#10)	157
Table 4-12	Sentence length - jail vs CSO - aggravated assault (# days).....	185
Table 4-13	Sentence length - jail vs CSO - drug trafficking (# days).....	191
Table 4-14	Drug trafficking – CSO and prison - probation attached.....	192

List of Figures

Figure 1-1	Canadian imprisonment rates: Total, federal, and provincial/territorial adult imprisonment rates per 100,000 population (1978/79 to 2016/17) .36
Figure 3-1	Dataset 2 vs CANSIM/CORRECTIONS—conditional sentence count.... 107
Figure 4-1	Primary sentences, probation, select sentence length – 2006 to 2017 (n=169,456) 126
Figure 4-2	Single charge cases by primary sentence (n=169,456) 127
Figure 4-3	Distribution of probation 2006 to 2017 (n=97,930)..... 130
Figure 4-4	Jail, conditional sentences & fines – with probation – 2006 to 2017 (n=40,532) 131
Figure 4-5	Conditional sentence utilization 2006 to 2017 (n=15,616) 132
Figure 4-6	BC survey results – 1998 (n=58) vs 2018 (n=57) - primary objective of conditional sentencing (Q#1)..... 170
Figure 4-7	Aggravated assault by primary sentence (n=517) 184
Figure 4-8	Theft over \$5,000 by primary sentence (n=700) 187
Figure 4-9	Drug trafficking by primary sentence (n=6,987) 190

List of Acronyms

ABD	Absolute discharge (JUSTIN code)
ACS	Adult Correctional Services Survey
BCCA	British Columbia Court of Appeal
CANSIM	Canadian Socio-Economic Information Management System
CCC	Criminal Code of Canada
CCJS	Canadian Centre for Justice Statistics
CCSS	Canadian Correctional Services Survey
CDSA	Controlled Drugs and Substances Act
CND	Conditional discharge (JUSTIN code)
CS	Conditional sentence (JUSTIN code)
CSB	Court Services Branch
CSC	Canadian Sentencing Commission
CSI	Conditional sentence of imprisonment (see CSO)
CSO	Conditional sentence order
DOJ	Department of Justice
F	Fine (JUSTIN code)
F/P/T	Federal/Provincial/Territorial
ICCS	Integrated Criminal Court Survey
ICSS	Integrated Correctional Services Survey
J	Jail (JUSTIN code)
JUSTIN	Justice Information System (BC)
MMP	Mandatory minimum penalty
MVA	Motor Vehicle Act
MSO	Most serious offence
MSS	Most serious sentence
OCJ	Office of the Chief Judge (BC Provincial Court)
ONCA	Ontario Court of Appeal
SCC	Supreme Court of Canada
SFU	Simon Fraser University
SS	Suspended sentence (JUSTIN code)

Failure is simply the opportunity to begin again,
this time more intelligently.

- Henry Ford

Introduction – The resurrection of the conditional sentence? The Ontario Court of Appeal reopens the debate

Conditional sentences of imprisonment (s.742.1) were introduced in 1996 for the primary purpose of reducing the use of incarceration in Canada. While they also served other objectives, none required the creation of a completely new sanction. Surrounded by controversy since their introduction, the most recent debate is no longer focused on whether conditional sentences have succeeded in their primary objective but, rather, the degree to which they have failed.¹ Canada's incarceration rate has not decreased in any obvious way since 1996, challenging traditional thinking around the utility of prison alternatives generally, and the conditional sentence in particular. Given that the sanction once held so much promise as a decarcerative strategy, it is important that we identify and seek to understand the mechanisms of its failure.

This study contributes to the academic literature in this area by exploring the use of conditional sentences in British Columbia, the province found to have experienced the most disappointing outcomes in recent evaluations that have examined the sanction's impact on the use of traditional imprisonment. The focus is on judicial perspectives on conditional sentencing, as provided through a survey and interviews with provincial court judges, and as supported through empirical analysis of criminal court data. Exploring what judges think about conditional sentences, and how they use them, provides a unique lens through which the sanction's lack of impact (effect) can be understood. As Doob noted decades ago, when dealing with the assumptions that promote the development and application of alternatives to imprisonment, it is the "beliefs, opinions, and decisions of judges" that matter.²

The timing of this project is serendipitous for two reasons. First, the ongoing viability of conditional sentences is uncertain at this point. The legislated restrictions that

¹ Webster, C. M., & Doob, A. N. (2019). Missed opportunities: A postmortem on Canada's experience with the conditional sentence. *Law and Contemporary Problems*, 82; Reid, A. A., & Roberts, J. V. (2019). Revisiting the conditional sentence of imprisonment after 20 years: Is community custody now an endangered species? *Canadian Criminal Law Review*, 24 (1), 1–37.

² Doob, A. N. (1990). Community sanctions and imprisonment: Hoping for a miracle but not bothering even to pray for it. *Canadian Journal of Criminology*, 32(3), 415–428, at p. 421.

signalled their “functional demise”³ in 2012 have been struck down recently by a 2020 decision of the Ontario Court of Appeal, reopening the debate on conditional sentencing.⁴ Second, the federal Minister of Justice has recently teased his intention to review the conditional sentencing legislation as part of a larger effort to address (again) “over-incarceration,” particularly of racialized communities.⁵

Conditional sentences are at a crossroads. On the one hand, the rhetoric of recent (2019) studies has conjured imagery of a “parasitical” sanction that is dead or at best diseased.⁶ On the other hand, we see efforts to resuscitate conditional sentencing—judges by being creative, counsel by challenging the restrictions that limit their availability and, most recently perhaps, by a government anxious to be seen to be “doing something” about systemic racism within the justice system. The disconnect between these positions must be explored and better understood prior to the enactment of any legislated response.

Overview – How did we get here?

Despite multiple cultural, economic, geographic, and historical affinities, the United States stands in sharp contrast to Canada in terms of its continuing belief in the use of imprisonment as a crime control strategy. While the US has—until very recently—encouraged the recourse to incarceration, Canadian penal policy has held firm in its belief in restraint for more than a century. In fact, policy has repeatedly framed imprisonment as being costly, cruel, and counter-productive as a crime control

³ Pomerance, R. M. (2013). The New Approach to Sentencing in Canada: Reflections of a Trial Judge. *Canadian Criminal Law Review*, 17(3), 305–326, at p. 308.

⁴ *R. v. Sharma*, 2020 ONCA 0478. “For all of these reasons, I would allow the appeal and declare that ss. 742.1 (c) and 742.1 (e)(ii) of the *Criminal Code* unjustifiably infringe ss. 7 and 15 of the *Charter* and are, therefore, of no force or effect” (at para 186). Note: Leave to appeal granted by the SCC January 14, 2021 (SCC Docket #39346).

⁵ Quote from federal Justice Minister David Lametti. Mulgrew, I. (2020, July 27). Facing the twin crises of justice: Fallout from pandemic and systemic racism create dilemma with no easy fix for Ottawa. *Vancouver Sun*, A1–A2.

⁶ One study uses rhetoric (“a post-mortem”) that suggests the sanction is already deceased—Webster & Doob, *supra* note 1; the other frames conditional sentences as an “endangered species” and “parasitical sanction[s]”—Reid & Roberts, *supra* note 1 at p. 35. When analyzing the impact conditional sentences have had on the use of custodial sentences, both reports note substantial variation between provinces, with perhaps the most disappointing results being observed in British Columbia.

mechanism. Further, this conception has formed the basis of Canada's longstanding promotion of the use of non-custodial options at both pre-sentence (bail) and post-sentence (parole) stages. Within the context of sentencing itself, efforts to reduce what is seen as an over reliance on incarceration have resulted in the creation of sanctions designed to act as alternatives to imprisonment. While there has been some (albeit limited) success at decarceration (e.g., the YCJA), the history of such reforms has largely been one of good intentions and disappointing results.⁷ Indeed, we have not yet solved the problem of over-incarceration, particularly when it comes to Indigenous, racialized, and other marginalized offenders, who continue to be disproportionately represented in our institutions.⁸

If there is any comfort to be taken from our failed efforts to promote restraint in the use of adult imprisonment, it is that we have not given up and, where we fail, we tend to fail "in the right direction."⁹ What is important is not that all programs succeed but, rather, that we monitor their utilization and learn from their evaluation. This requires a clear understanding of program goals and anticipated impacts; both are necessary to identify initiatives that have not lived up to their promise. Indeed, the appropriate operationalization of reforms is a prerequisite for objective assessments of their success or failure—what worked and what did not. More importantly, we should strive to gain an understanding of *why* a given strategy has not produced expected results.

As a pertinent example, Parliament directed judges in 1996 to exercise restraint in the use of prison and introduced a new sanction intended to provide a non-custodial option for offenders otherwise destined for imprisonment—the conditional sentence order.¹⁰ Constructed not as an alternative to imprisonment but, rather, as an *alternate*

⁷ The YCJA explicitly limits the circumstances in which a sentence of imprisonment can be considered (s. 39). For another Canadian example which suggests meaningful reductions in the use of incarceration can be achieved, see Webster, C. M., & Doob, A. N. (2014). Penal reform "Canadian style": Fiscal responsibility and decarceration in Alberta, Canada. *Punishment & Society*, 16(1), 3–31.

⁸ Reid, A. A. (2017). The (Differential) Utilization of Conditional Sentences among Aboriginal Offenders in Canada. *Canadian Criminal Law Review*, 22(2), 133; Roberts, J. V., & Reid, A. (2017). Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story. *Canadian Journal of Criminology and Criminal Justice*, 59(3), 1–32.

⁹ Webster & Doob, *supra* note 1 at p. 196.

¹⁰ Bill C-41, *An Act to amend the Criminal Code (sentencing) and other Acts in consequence thereof*. 35th Parliament, 1st Session. S.C. 1995, c 22 (herein Bill C-41).

form of imprisonment,¹¹ conditional sentences were controversial from the start in terms of both form and function. Described as an oxymoron enshrined into Canadian law, s.742.1 of the *Criminal Code* initially gave sentencing judges broad discretion by connecting eligibility primarily to sentence length, as opposed to identifying specific groups of offences for which it would be available (or unavailable).¹² Yet, the sanction clearly had the potential to result in a substantive shift away from the use of traditional imprisonment.

However, given that judges in Canada already had the option of suspending sentence and placing an offender on probation, it was unclear where the conditional sentence would fit in terms of existing sanctions. Early research suggested that many judges struggled with the new sanction's purpose, scope, and ability to address deterrence and denunciation—sentencing objectives that up to that point had generally not been associated with community-based options.¹³ Academics drew attention to theoretical and operational challenges, while the provincial appellate courts attempted, with mixed results, to resolve the methodological and conceptual issues that arose from the unusual statutory construction.

In 2000, the Supreme Court of Canada stepped in to provide guidance in terms of the scope and methodology of conditional sentencing. In *R. v. Proulx*,¹⁴ the Court

The principle of restraint is codified in sections 718.2(d) and (e) (current wording):

718.2(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; and (e) all available sanctions, other than imprisonment, that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.

See Appendix B for full text of the conditional sentencing provisions, including amendments made 1996-2015.

¹¹ In this thesis the term “jail” is sometimes used in place of “prison.” This is, in part, a way to avoid having to qualify terms (e.g., “real prison” or “traditional prison”), and in part a reflection of how most practitioners, including the judges interviewed as part of this project, speak.

¹² For conditional sentences as an “oxymoron” see Brodeur, J.-P. (1999). Sentencing reform: Ten years after the Canadian Sentencing Commission. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (pp. 332–348). University of Toronto Press, at p. 341.

¹³ Roberts, J. V., Doob, A. N., & Marinov, V. (2000). *Judicial attitudes to conditional terms of imprisonment: Results of a national survey*. (1998 National Survey) Ottawa: Department of Justice Canada. The survey was distributed in May of 1998 and completed by September of 1998. The reported response rate was 36% (461 judges).

¹⁴ *R. v. Proulx*, 2000 SCC 5.

adopted a purposive and benevolent interpretation in an effort, some have suggested, to salvage a sanction that had struggled up to that point.¹⁵ Appellate court decisions had been in conflict on key issues. Did Bill C-41 simply codify existing principles, or did it establish a new sentencing framework? Were conditional sentences terms of imprisonment (community custody), or were they more accurately characterized as some form of enhanced probation? Did they fill only “a small gap”, or did they represent a new tool intended to be used broadly to reduce the use of incarceration in Canada?¹⁶

In *Proulx* the Supreme Court of Canada endorsed Bill C-41 as a prison reduction strategy and reconstructed conditional sentences as punitive sanctions capable of addressing not only rehabilitative and restorative objectives, but also deterrence and denunciation.¹⁷ The decision gave sentencing judges the language and methodology they needed. The sanction would be more effective than traditional imprisonment, supporters argued, because offenders avoided the negative impacts of incarceration (e.g., lost employment, fragmented relationships, etc.) and would be highly motivated by the facilitated breach mechanisms¹⁸ to comply with both punitive and rehabilitative conditions. What policy-makers perhaps should have more fully anticipated, however, is that the enforceability of conditional sentences would lead judges to conclude they were also more effective than suspended sentences.¹⁹

¹⁵ Webster & Doob, *supra* note 1 at p. 173.

¹⁶ Manson, A. (1998). Conditional sentences: Courts of Appeal debate the principles. *Criminal Reports (5th)*, 15, 176–200.

¹⁷ For a general discussion of the impact of the *Proulx* decision see also Roberts, J. V., & Healy, P. (2001). The future of conditional sentencing. *Criminal Law Quarterly*, 44, 309–341.

¹⁸ The breach provisions set out for conditional sentences (s. 742.6) anticipate an early hearing date and an abbreviated process. Breaches are dealt with as allegations as opposed to new offences; proof can be satisfied by the supervisor’s written report and must only meet the “balance of probabilities” standard (not proof “beyond a reasonable doubt”). See Fleischhaker, C. L. (2000). The breach provisions of the conditional sentence a.k.a. “Expeditious Justice.” *Criminal Law Quarterly*, 43, 305.

¹⁹ In fairness, the legislation contained provisions intended to mitigate the negative impact of net-widening. First, section 742.1(a) requires that the court impose a sentence of imprisonment of less than two years, before considering whether to make the sentence conditional. Second, since an offender serving a conditional sentence is given credit for time served in the community, in the event of a breach the most an offender can be ordered to serve is the remainder of the sentence. Finally, section 742.6(9) gives judges several options when responding to proven breaches: taking no action, changing optional conditions, or having the offender serve all or part of the remaining sentence in custody.

Post *Proulx*, conditional sentences were longer and more punitive.²⁰ The Court chose not to restrict judicial discretion in terms of eligible offences, confirming that conditional sentences remained available for any offence that satisfied the minimal statutory requirements.²¹ Notwithstanding their increased punitive “bite,” conditional sentences for serious offences remained controversial and, by the mid-2000s, had become a talking point in national politics. The politicization of sentencing policy continued throughout the decade, with perhaps predictable results. In 2007, serious personal injury offences became ineligible for conditional sentencing (Bill C-9),²² and with the enactment of the *Safe Streets & Communities Act* (Bill C-10; 2012),²³ almost all serious offences were similarly restricted.²⁴ While the primary objective of conditional sentences was to divert offenders from prison to the community, overall incarceration rates in Canada have remained generally stable, and recent (2019) research suggests disappointing results, especially in BC.²⁵

With the change in federal government in 2015, there was an expectation that a more progressive criminal justice agenda would be applied in sentencing. Aside from campaign rhetoric, there was a clear direction to the incoming Liberal Justice Minister to review the sentencing reforms of the previous decade.²⁶ To date, Bill C-10 restrictions

²⁰ Roberts, J. V. (2002). The evolution of conditional sentencing: An empirical analysis. *Criminal Reports (6th)*, 3.

²¹ “No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences.” *Proulx*, *supra* note 14 at para 127.

²² Bill C-9, *An Act to amend the Criminal Code (conditional sentence of imprisonment)*. First reading May 2006; passed with amendments May 2007 (herein Bill C-9).

²³ Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts* (Short title: *Safe Streets and Communities Act*). Introduced September 20, 2011; Royal Assent March 13, 2012 (herein Bill C-10).

²⁴ One judge from Ontario’s Court of Justice suggests that the restrictions introduced by Bill C-10 signaled the “functional demise of the conditional sentence.” Pomerance, *supra* note 3 at p. 308.

²⁵ Webster & Doob, *supra* note 1; Reid & Roberts, *supra* note 1. As will be discussed in chapter 2.4.1, two recent (2019) evaluations suggest that the introduction of conditional sentences had either “a modest” or “no meaningful” impact on the use of traditional imprisonment. With specific reference to the province of British Columbia, the sanction may have ironically contributed to increases, rather than decreases, in the use of incarceration.

²⁶ Excerpt from mandate letter to the Minister of Justice Jody Wilson-Raybould (from Prime Minister J. Trudeau; 12 Nov 2015) – “You should conduct a review of the changes in our criminal

have not been reversed by government, though recent legislation (Bill C-75)²⁷ may have the indirect effect of increasing the number of offences eligible for conditional sentences.²⁸ In contrast, appellate courts have been more active in neutering the restrictive provisions, striking down a number of mandatory minimum sentences and, more recently, declaring specific legislated restrictions on conditional sentencing of no force or effect.²⁹ Optimistically, one might be tempted to argue that the time is ripe for change. Whether through judicial decisions or parliamentary legislation, the conditional sentence may have a second chance in fulfilling its intended—but yet unsuccessful—role in reducing Canada's use of imprisonment.

The current study

This thesis contributes to the dialogue on decarceration and the principle of restraint by identifying and exploring the mechanisms of failure generally associated with conditional sentencing. At the operational level, these weaknesses include inadequate planning and resourcing; at the conceptual level, its unfortunate construction (as a form of imprisonment) and its inappropriate application to offenders not initially facing prison sentences (net-widening). On paper, conditional sentences should have reduced prison populations by diverting offenders who otherwise would have been imprisoned, into the community. Certainly, the sanction had the potential to contribute substantially to the

justice system and sentencing reforms over the past decade with a mandate to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system.”

It should be noted that a more recent mandate letter (13 Dec 2019) includes no mention of further sentencing reforms. <https://pm.gc.ca/en/mandate-letters/minister-justice-and-attorney-general-canada-mandate-letter>

²⁷ Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c 25. Royal Assent June 21, 2019; see also proposed legislation introduced by Senator Kim Pate that would restore judicial discretion in sentencing by allowing judges to disregard restrictions, including mandatory minimum penalties (MMPs). See Bill S-208, *An Act to amend the Criminal Code (independence of the judiciary)*. First reading in the Senate February 2, 2020. <https://www.parl.ca/LegisInfo/BillDetails.aspx?Language=en&Mode=1&billId=10625187>.

²⁸ Most of the restrictions on the use of conditional sentencing that were introduced in 2012 apply only to offences when *prosecuted by way of indictment*. See ss. 742.1(b) -742.1(f) CC. Bill C-75 reclassifies many indictable offences as hybrids and standardizes the maximum penalty for summary offences at two years' imprisonment.

²⁹ *Sharma*, *supra* note 4 at para 186.

decarceration effort.³⁰ To the extent that this did not occur, it is important that we understand why so that we can move forward with more effective strategies.³¹ In that sense, the story of conditional sentencing need not be solely one of disappointment.

This project addresses multiple gaps in the existing research literature. First, the data analyzed spans a time (2006-2017) that post-dates the early years of conditional sentencing, when the bulk of research on the new sanction occurred.³² Second, the use of multiple court datasets allows for a more meaningful analysis of judicial decision-making on sentence. This includes an assessment of conditional sentence utilization relative to other sanctions over time, and detailed information regarding sentence length, optional conditions imposed, and the incidence of (and response to) proven breaches. Most importantly, this thesis incorporates the perspectives of BC Provincial Court judges through the use of a survey and interviews. The survey intentionally repeats several of the questions posed in an earlier national survey of judges (1998 National Survey), allowing for a comparison of responses “20 years later.”³³

The interviews provide insight into the views of judges and allow us to better understand the challenges of conditional sentencing as experienced by those on the ground, making the decisions. While academics and policy makers can (and do) debate the need for more sentencing options, in paying attention to the voices of judges it becomes apparent that the appeal of conditional sentencing is not only, or even primarily, related to prison reduction. This is in part related to the rhetoric that has surrounded the sanction, if not from its introduction, then certainly since the Supreme Court of Canada decision in *Proulx*.

³⁰ Roberts, J. V., & Gabor, T. (2004). Living in the shadow of prison: Lessons from the Canadian experience in decarceration. *British Journal of Criminology*, 44, 92–112, at p. 97-98.

³¹ For instance, in the context of conditional sentencing, there are several possible explanations for the lack of success noted overall. These include, but are not limited to, the misapplication of the sanction (to offenders not otherwise facing prison), the limited use of conditional sentences relative to other sanctions, or the effect of the recalibration of conditional sentences that occurred as a result of the Supreme Court of Canada’s direction to sentencing judges that they make conditional sentences longer than the prison terms they were intended to replace, include onerous conditions to confirm their punitive nature, and deal harshly with proven breaches. *Proulx*, *supra* note 14.

³² There was a flurry of publications in the first ten years of the sanction’s existence. Almost three-quarters (74.4%) of the publications referenced in this thesis (specifically on conditional sentencing) were produced between 1996 and 2005.

³³ Roberts et al., *supra* note 13.

In its analysis of conditional sentencing as a decarcerative tool, this thesis offers a detailed and comprehensive review of the sanction's use in British Columbia. Chapter 1 focuses on the history of the Canadian criminal justice system in terms of the development of the principle of restraint, and its relationship to the overall stability in incarcerated populations. Our historical and ongoing commitment to restraint in the use of imprisonment provides the conceptual framework for this research.

Chapter 2 includes an overview of the creation of conditional sentences (s. 742.1) and the development of the law on their application. This section considers the challenges of conditional sentencing as experienced upon implementation, as continued in the wake of the Supreme Court of Canada decision in *Proulx*, and as setting the stage for the restrictions imposed by Bill C-10. Chapter 3 sets out the methodological approach adopted in this project. This includes the rationale for relying on a strategy that integrates both quantitative (court sentencing statistics and a survey) and qualitative (interviews with judges) data. The various datasets are defined and described; limitations of the research design are addressed.

Having established the necessary conceptual and methodological context, Chapter 4 presents the main results of this study, incorporating, where appropriate, findings from the various data sources. Descriptive information regarding the data sources utilized in this project is provided in Chapter 4.1. Sub-chapters that follow explore the ways in which the conditional sentence has failed to accomplish its decarcerative objective. Specifically, Chapter 4.2.1 focuses on data that suggest the introduction of conditional sentencing was accompanied by more net-widening than previously estimated. Net-widening and the related practice of sentence “up-tariffing” (4.2.2) are explored and linked to other identified challenges. In Chapter 4.2.3, the analysis shifts to consider the impact of the legislative restrictions placed on the use of conditional sentences. Indications that judges found ways to circumvent the restrictions are of particular interest, as are appellate court cases that have effectively enabled this practice (e.g., the 2015 BCCA decision in *Voong*).³⁴

Finally, Chapter 5 discusses the findings in terms of their implications for current sentencing policy. Provincial appellate court jurisprudence is incorporated to the extent

³⁴ *R. v. Voong*, 2015 BCCA 285.

that it is relevant to the future of conditional sentencing (e.g., the recent (2020) decision from the Ontario Court of Appeal in *Sharma*).³⁵ The concluding section summarizes key theoretical, methodological, and practical/policy takeaways and identifies areas for future research.

³⁵ *Sharma*, *supra* note 4.

1 Restraint in the use of imprisonment

When approaching a large project, it is helpful to have a framework within which data can be organized and topics explored.³⁶ Grounding research in theory also relates it to existing academic debates and to the work of others.³⁷ This thesis began as an exploration of judicial perspectives on conditional sentencing. As the project progressed, however, it became clear that the most interesting themes emerging from the data spoke to the challenges of conditional sentencing, particularly those that affected the sanction's ability to operate effectively as a tool for prison reduction. While judges differed in terms of how they used conditional sentences, there was general agreement that the sanction was introduced to offer an alternative to imprisonment, and that incarcerating fewer people was a "good thing." This principle of restraint (in the use of imprisonment) provides a useful conceptual framework for this project.³⁸

1.1 Restraint as a historically entrenched belief in Canada

The Canadian Sentencing Commission (1987) referenced no fewer than 16 official reports issued between 1831 and 1983 that identified concerns regarding prisons as "schools of crime," noting, with some frustration, that even these repetitive calls to reduce the use of imprisonment resulted in essentially no significant change.³⁹ Similar themes of decarceration and the need for restraint are evident throughout the historical record in Canada. In fact, if one were to list the principal reports, commissions, and committees that have expressed concern about Canada's recourse to imprisonment as well as suggested restraint in its use, the list would be long and extend over the better

³⁶ Lau, R. R., & Schlesinger, M. (2005). Policy frames, metaphorical reasoning, and support for public policies. *Political Psychology*, 26(1), 77–114, at p. 80.

³⁷ Taekema, S. (2018). Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice. *Law and Method*. <https://doi.org/10.5553/REM.000031>, at p. 4.

³⁸ For a review of the history of the restraint principle (as it has evolved since the mid-1800s), see Canadian Sentencing Commission. (1987). *Sentencing reform - a Canadian approach: Report of the Canadian Sentencing Commission*. J.R. Omer Archambault, Chair. (CSC) Ottawa: Minister of Supply and Services Canada, at pp. 44-45.

³⁹ *Ibid* at pp. 40-44. The CSC describes Canadian penal history as "a tribute to resiliency" and refers to the sequence of official reports as "systematic redundancy" (at p. 40).

part of a century.⁴⁰ The following section touches on several such official reports to illustrate the consistency with which successive federal governments have embraced the principle of restraint. The intent is not to provide an exhaustive review of the literature in this area but, rather, to contextualize conditional sentences by establishing them as the manifestation of our longstanding desire to reduce our reliance on imprisonment.

The 1969 Report of the Canadian Committee on Corrections (herein the *Ouimet Report*) encompassed a broad review of the field of corrections. In addition to endorsing the principle of restraint, the report focused on the need to move from a punitive model to one that is more rehabilitative in nature. This shift reflected the importance placed (and repeatedly stressed) on dealing with the offender in the community. Indeed, common sense assumptions are often used to support the greater effectiveness of community-based programs, though there is also a call for “long-term empirical research” regarding different correctional approaches.⁴¹ The overall message of the report can be summarized as follows:

Segregate the dangerous, deter and restrain the rationally motivated professional criminal, deal as constructively as possible with every offender as the circumstances of the case permit, release the harmless, imprison the casual offender not committed to a criminal career only where no other disposition is appropriate. In every disposition the possibility of rehabilitation should be taken into account.⁴²

The *Ouimet Report* is referenced as a landmark document, one that set the tone for subsequent publications in its conclusion that “imprisonment or confinement should be used only as an ultimate resort when all other alternatives have failed.”⁴³

Support for restraint continued into the 1970s. Importantly though, during this era Canada’s continuing commitment to this principle begins to reveal significant differences in sentencing policies between Canada and the United States. Indeed, Webster and

⁴⁰ Webster, C. M., & Doob, A. N. (2020). Principles and politics: Sentencing and imprisonment policy in Canada (Ch. 17). In *Sentencing in Canada: Essays in law, policy and practice*. Irwin Law, at p. 348 (Table 17.1). The partial list compiled by Webster and Doob includes 20 publications released between 1914 and 1998.

⁴¹ Report of the Canadian Committee on Corrections. (1969). *Towards Unity: Criminal Justice and Corrections*. Ottawa: Queen’s Printer (Ouimet Report), at p. 15-18.

⁴² *Ibid* at p 185.

⁴³ *Ibid* at p. 204.

Doob (2018) note this divergence in that decade between the Canadian and American experiences:

In 1976, just as American imprisonment rates were beginning to rise and an incapacitation/deterrence model was being established, Canada turned in the opposite direction. Restraint in the use of imprisonment became the rallying cry.⁴⁴

Symptomatically, in 1977 the Sub-Committee on the Penitentiary System in Canada released its Report to Parliament (herein the *MacGuigan Report*).⁴⁵ Chaired by Mark MacGuigan, this report focused primarily on the penitentiary service, identifying a “crisis” that, it argued, could only be addressed through the “immediate implementation of large-scale reforms.”⁴⁶ In particular, the *MacGuigan Report* was highly critical of what it saw as the overuse of imprisonment as an expensive and ineffective sentencing option, noting critically that:

Society has spent millions of dollars over the years to create and maintain the proven failure of prisons. Incarceration has failed in its two essential purposes – correcting the offender and providing permanent protection to society.⁴⁷

Ultimately the *Report* endorsed the creation of alternatives to imprisonment, arguing that they would be less costly and more productive.

Calls for restraint accelerated in the 1980s, largely reflecting the frustration of reformers anxious to translate the theoretical construct of restraint into policy directives and ultimately a reduction in Canada’s reliance on imprisonment. This began with the release of a federal government policy paper in 1984 that provocatively referred to sentencing as “the climax of the criminal justice process,” underlining its pivotal role as one of the “gatekeepers” of prison admissions at that time, and establishing it as the

⁴⁴ Doob, A. N., & Webster, C. M. (2018). Penal optimism: Understanding American mass imprisonment from a Canadian perspective. In K. R. Reitz (Ed.), *American exceptionalism in crime and punishment*. Oxford University Press, at p. 159.

⁴⁵ MacGuigan Report. (1977). *Report to Parliament by the Sub-Committee on the Penitentiary System in Canada*. Ottawa: Minister of Supply and Services Canada.

⁴⁶ *Ibid* at p. 2.

⁴⁷ *Ibid* at p. 35.

principal field upon which the rhetorical debate would occur.⁴⁸ The policy statement embraced restraint in the use of imprisonment, clearly noting only three scenarios that might justify incarceration: “separation of offenders posing a threat to life and personal security; denunciation of conduct so reprehensible that lesser punishment would be inappropriate; and last resort coercion of offenders who wilfully refuse to comply with other sanctions.”⁴⁹

The 1980s were a busy decade for sentencing reformists, with two substantive reports being released: the Report of the Canadian Sentencing Commission in 1987⁵⁰ (herein the CSC) and the House of Commons Standing Committee on Justice and Solicitor General in 1988 (herein the *Daubney Report*).⁵¹ Similar to previous reports, the problems identified by the CSC included an absence of policy from Parliament on guiding principles for sentencing, and an over-reliance on imprisonment as a sanction.⁵² The CSC contributed to the debate by arguing that part of achieving greater restraint in the use of imprisonment required a reconsideration of how we visualize punishment. Specifically, that the traditional dichotomy between custody and all other sanctions must be replaced with, instead, a continuum which runs from minimal coercion (e.g., discharge) to extreme coercion (e.g., incarceration). Within such a view community-

⁴⁸ Government of Canada. (1984). *Sentencing*. Ottawa; ON, at p.1. The imprisonment debate, until recently, has focused on sentencing. More recently, the target of decarcerative efforts has largely shifted to focus on the remand population (i.e., accused persons held in custody as a result of being (formally or informally) detained until trial). This change likely coincided with the point in time at which the remand population overtook the sentenced population.

⁴⁹ *Ibid* at p. 38. This language essentially echoed the position taken by the Law Reform Commission in their recommendation that the use of prison be restricted to three kinds of cases: “(1) for offenders too dangerous to leave at large; (2) for offenders for which, as things are now, no other adequate denunciation presently exists; and (3) for offenders wilfully refusing to submit to other punishments.” Law Reform Commission of Canada. (1976). *Our Criminal Law*. Ottawa, at p. 25.

⁵⁰ CSC, *supra* note 38.

⁵¹ The *Daubney Report* endorsed providing opportunities for offender “habilitation,” and focused on offender accountability (taking responsibility), reparations to victims and/or the community and victim-offender reconciliation.

House of Commons, Canada. (1988). *Taking Responsibility. Report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections*. David Daubney, Chair. Ottawa: Queen’s Printer for Canada.

⁵² CSC, *supra* note 38 at p. xxii.

based sanctions can be seen, not as lesser responses, but as appropriate and proportional ones.⁵³

And yet the CSC acknowledged that more would be required. The debate on penal policy occurring in the mid-1980s was complicated by the larger philosophical discussion that questioned the motivation of governments seeking to “de-institutionalize.”⁵⁴ As a result, the CSC spent considerable time addressing concerns that community sanctions often act to increase, rather than decrease, the number of offenders subject to control (a phenomenon generally referred to as net-widening).⁵⁵ This can occur when a new sanction—one that is intended to be used in place of a more severe option—is, instead, used as an “add-on” to the severe sentence, or, more likely, is used in place of a sanction that would have been less severe.⁵⁶ To lessen the likelihood of either form of net-widening, the CSC suggested that explicit direction be given to judges and that community-based options be developed as independent sanctions, rather than as alternatives to imprisonment.

It is notable that both the CSC and *Daubney Report* recognized that providing community-based options alone would not necessarily lead to a change in sentencing trends; if the goal was a principled reduction in the use of imprisonment, sentencing guidelines would also be required. Specifically, in terms of promoting guidance intended

⁵³ *Ibid* at p. 347.

⁵⁴ The CSC referenced Stanley Cohen (1985), making it clear that they were aware of (and concerned about) the tendency of strategies for prison reduction to, at best, have no impact—at worst, to make things worse. Cohen, S. (1985). *Visions of social control: Crime, punishment, and classification*. Polity Press, at p. 48.

⁵⁵ CSC, *supra* note 38 at p. 367.

⁵⁶ An example of the former (an “add-on”) could include community work service (or restitution) being added as an obligation in addition to a term of imprisonment (i.e., conditions of a probation order made to follow imprisonment). The second net-widening scenario could include an offender being sentenced to a conditional sentence instead of suspended sentence or fine (not instead of a term of imprisonment).

While not directly associated with sentencing, an additional form of net-widening is that which occurs when offenders who would not otherwise be brought into the formal justice system (e.g., candidates for diversion or alternative measures), are charged and processed, often with benevolent intentions. In a recent interview, for instance, the police Chief for a location that reported disproportionately high charge rates for simple drug possession (relative to other more populated jurisdictions) explained that his officers view processing charges through the formal court system as another tool in their toolbox, one that can be used to facilitate, or even mandate, treatment that might otherwise be unavailable. Griffiths, N. (2020, December 27). Drug possession charges vary by force. *The Province*, at p. 6.

to restrict the use of imprisonment, the CSC proposed the introduction of presumptive “out” of custody designations for most offences.⁵⁷ For example, the report proposed presumptive “out” of custody dispositions for essentially all summary offences. This would include common assault, drug possession, theft, possession of stolen property, false pretenses, or fraud under \$1,000 (an unqualified out of custody presumption), and failing to appear in court or comply with release conditions, or breach of probation (a qualified out of custody disposition⁵⁸).

As one might expect from a Parliamentary Committee that was formed, at least in part, in response to eroding public confidence in the justice system,⁵⁹ the *Daubney Report* was more outwardly consultative.⁶⁰ Perhaps as a result, it took a less controversial approach, supporting, for instance, only advisory guidelines, though it endorsed the CSC’s recommendation that a permanent sentencing commission be created. The *Daubney Report* is relevant to the narrative of restraint for two reasons. First, it extended the golden thread that had run through earlier reports, framing restraint as a well-established sentencing principle in Canada, noting that:

Not surprisingly, then, the Sentencing Commission, following the leads of the Ouimet Committee and the Law Reform Commission of Canada, recommended that sentences of imprisonment be used with restraint and that they be reserved normally for the most serious offences, particularly those involving violence.⁶¹

⁵⁷ CSC, *supra* note 38 at p. 302.

⁵⁸ *Ibid* at p. 509-514. For qualified out of custody presumptions “the offender is not to be incarcerated unless both of the following conditions are met: the offence is serious AND the offender has a relevant record” (at p. 312).

The inclusion of the “administration of justice” offences (e.g., failing to comply with conditions, breach of probation) in such a scheme is noteworthy, given that such offences often receive custodial dispositions. In a 2006 study of short jail terms, Marinos found that administration of justice offences accounted for the greatest proportion (46.8%) of jail sentences of 30 days or less. See Marinos, V. (2006). The meaning of “short” sentences of imprisonment and offences against the administration of justice: A perspective from the Court. *Canadian Journal of Law and Society*, 21(2), 143 (at p. 151).

⁵⁹ *Daubney Report*, *supra* note 51 at p. 1.

⁶⁰ The terms of reference tasked the Daubney Committee with considering the report of the CSC (and others) and inviting “the expression of views from all participants in the criminal justice system, both governmental and nongovernmental, federal and provincial, including, but not restricted to, the judiciary, crown prosecutors, defence lawyers, police forces, victims, inmates, aftercare agencies, advocacy groups and academic researchers.” *Ibid* at p. 269.

⁶¹ *Ibid* at p. 50.

Second, like the CSC, the *Daubney Report* endorsed the increased use of community sanctions and was critical of the pursuit of utilitarian objectives through the use of custody. “The Committee further believes that, except where to do so would place the community at undue risk, the ‘correction’ of the offender should take place in the community and imprisonment should be used with restraint.”⁶² What is notable, however, is the rhetorical shift between the two reports. While both anchor the principle of restraint as distanced from the notion of punishment,⁶³ the *Daubney Report* takes a noticeably more optimistic (politically attractive) view of the capacity of sentencing to achieve positive results. It accepts public protection as a goal of sentencing,⁶⁴ rejects the notion that “nothing works,”⁶⁵ and emphasizes more attainable sentencing objectives through the incorporation of restorative justice concepts—e.g., accepting responsibility, being held accountable, victim-offender reconciliation, making reparations, acknowledging harm to victims and the community, etc.

It is unclear why the federal government of the day failed to act upon receipt of the *Daubney Report* in 1988. There was consensus on the primary issues, including the need for parliamentary direction through the codification of the purpose and principles of sentencing, and the creation of a permanent sentencing commission. Yet, instead of seizing this opportunity for fundamental and principled reform, the government issued a set of three discussion papers in 1990.⁶⁶ *Directions for Reform: Sentencing* was released under the signature of the (Conservative) Minister of Justice at the time, Kim Campbell. The document included a proposed statement of the purposes and principles of sentencing that was essentially an amalgam of those recommended by the CSC and the *Daubney Report* and adopted the recommendation that a permanent Sentencing and Parole Commission be created.⁶⁷

⁶² *Ibid* at p. 54.

⁶³ CSC *supra* note 38 at p. 365; *Daubney Report*, *supra* note 51 at p. 53.

⁶⁴ *Daubney Report*, *ibid* at p. 45.

⁶⁵ *Ibid* at p. 52.

⁶⁶ The three government publications issued in 1990 included: *Directions for reform: Sentencing*; *Directions for reform: Corrections & conditional release*; and *Directions for reform: A framework for sentencing, corrections & conditional release*.

⁶⁷ Government of Canada. (1990). *Directions for reform: Sentencing*. Ottawa: Solicitor General of Canada at p. 10.

If nothing else, this compendium of discussion papers served not only to further reaffirm restraint as a central feature of criminal justice policy over time, but also to highlight that this message traversed party lines. Indeed, the proposal made in 1990 by the Conservative Minister of Justice codified the principle of restraint, stating that “a sentence should be the least onerous alternative appropriate in the circumstances.”⁶⁸ The phrase “appropriate in the circumstances” was expanded in provisions that introduced presumptive limits on the use of imprisonment, using wording similar to that used in the Liberal policy document produced in 1984.⁶⁹ More broadly, Doob and Webster make the same point in 2015 when discussing restraint as “a dominant leitmotif” throughout Canadian criminal justice history. Specifically, they highlight that this theme emerges across both major national political parties (at least until 2006). As the most obvious illustration, they note that the 1982 Liberal document (described as a statement of the policy of the government on the purpose and principles of criminal law) was re-released by the Conservative government in 1989, with only the Preface containing the Liberal Justice Minister’s signature removed.⁷⁰

Despite this broad and longstanding political consensus surrounding the need for restraint in the use of criminal law generally, and imprisonment in particular, its actual legislative translation was less ambitious than the one repeatedly endorsed by official statements across the prior decades. Notably, two years after the 1990 discussion papers, Kim Campbell (still Minister of Justice) introduced a sentencing reform bill (Bill C-90). While it included a statement of the purpose and principles of sentencing it did not mention a sentencing commission.⁷¹ Further, the broad language that had been

One of the objectives of the Commission would be to develop sentencing guidelines following the model set out in the report of the CSC; another was to encourage and promote judicial training on aspects such as “the impact of sentencing alternatives” (at p.11).

⁶⁸ *Ibid* at p. 8.

⁶⁹ The proposal suggested that imprisonment should only be imposed: 1) to protect the public from crimes of violence; 2) where any other sanction would not sufficiently reflect the gravity of the offence or the repetitive nature of the criminal conduct of an offender, or adequately protect the public or the integrity of the administration of justice; or 3) to penalize an offender for wilful non-compliance with the terms of any other sentence that has been imposed on the offender where no other sanction appears adequate to compel compliance. *Ibid* at p. 8.

Notably, this is the same wording proposed by the CSC, *supra* note 38 at p. 154.

⁷⁰ Webster, C. M., & Doob, A. N. (2015). US punitiveness “Canadian style”? Cultural values and Canadian punishment policy. *Punishment & Society*, 17(3), 299–321 at pp. 304 and 306.

⁷¹ Bill C-90, *An Act to Amend the Criminal Code (sentencing)*. First Reading June 23, 1992 in the Third Session, 34th Parliament.

proposed in the 1990 discussion paper was replaced by a more restrictive form of restraint that focused on the use of imprisonment. As a case in point, instead of requiring that “a sentence should be the least onerous alternative appropriate in the circumstances,” the principle of restraint was reflected in requirements that the court not deprive offenders of their liberty if less restrictive alternatives may be appropriate, and that all available alternatives to imprisonment be considered, particularly when dealing with Aboriginal offenders.⁷²

Although Bill C-90 died on the order paper when Parliament was dissolved later that year, its concerns regarding the overuse of incarceration were repeated in the sentencing provisions enacted through Bill C-41 in 1996.⁷³ The principle of restraint was successfully codified, for the first time, in the *Criminal Code*. Using essentially the same language as that proposed in Bill C-90, sections 718.2(d) and (e) directed sentencing judges that “an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances;” and that “all available sanctions, other than imprisonment, that are reasonable in the circumstances⁷⁴ should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders.”

Notably, the codification of the principle of restraint was uncontroversial. This may have reflected—at least in part—political pressure to address the national embarrassment posed by our relatively high adult incarceration rate.⁷⁵ When introducing Bill C-41 at second reading, the Minister of Justice noted that:

It is worthwhile to remind the House that Canada's incarceration rate is extremely high compared with other industrialized countries. Furthermore, studies show that for minor and first-time offenders, incarceration is not

⁷² The more restrictive wording used in Bill C-90 (and ultimately Bill C-41) represented a change from the Department of Justice discussion paper (1990), which endorsed the exact wording of the statement proposed by the CSC. See DOJ discussion paper, *supra* note 67 at p. 8, and CSC, *supra* note 38 at p. 154.

⁷³ Bill C-41, *supra* note 10.

⁷⁴ Section 718.2(e) was amended to add *and consistent with the harm done to victims or to the community* by the *Victims Bill of Rights Act*, S.C. 2015, c.13, s.23.

⁷⁵ Reductions in the youth imprisonment rate, for example, have been linked to Canada's “shameful” youth incarceration rates in the mid-1990s. See Webster, C. M., & Doob, A. N. (2019). The will to change: Lessons from Canada's successful decarceration of youth. *Law & Society Review*, 53(4), 1092.

very useful or effective and may even be harmful if the goal is to turn the person into a law-abiding citizen.⁷⁶

Alternatively, it could simply be an acknowledgement of where public sentiment was at the time, which might be characterized as a common-sense acceptance of the restraint principle, at least as it relates to certain offenders. This appears to be what the Minister of Justice was reflecting in the House of Commons, saying that “a general principle that runs throughout Bill C-41 is that jails should be reserved for those who should be there. Alternatives should be put in place for those who commit offences but who do not need or merit incarceration.”⁷⁷ Presumably the references to “those who should be [in jail]” and those “who do not need or merit incarceration” were intended to capture first-time, low risk, or non-violent offenders (that would, for some reason, otherwise go to jail?).⁷⁸

One of the sustained narratives of Bill C-41 is that it was intended to reduce the use of imprisonment. Importantly, this goal was to be accomplished not only through the encouragement of judicial restraint in the newly codified principles of sentencing and the introduction of alternative measures (diversion) for adult offenders. It was also the underlying justification for the creation of the conditional sentence of imprisonment.

1.2 Foundations for our longstanding belief in restraint

In some ways, the rhetoric supporting our commitment to the principle of restraint reflects what Ericson (1987) described as the “discourse of the conventional reform trinity—cost, effectiveness, and humaneness.”⁷⁹ This “trifecta” has also been taken up and largely expanded by Doob and Webster.⁸⁰ While using slightly different language,

⁷⁶ Canada, Parliament, House of Commons, September 20, 1994: Allan Rock (Minister of Justice and Attorney General of Canada) at 5872.

⁷⁷ *Ibid* at 5873.

⁷⁸ Alternatively (and perhaps pessimistically), it could signal a recognition that the principle, as drafted, had been so diminished through decades of consultation, that it was seen as being more symbolic than instrumental, and not expected to have much of a real-world impact.

⁷⁹ Ericson, R. (1987) “The state and criminal justice reform.” In *State Control*, edited by Ratner and McMullan, Ch. 2, (Vancouver: UBC Press), at p.21.

⁸⁰ The links between the principle of restraint and issues of crime reduction, social values, and cost, have been developed extensively in a series of articles published by Doob and Webster. These include a) Doob, A. N., & Webster, C. M. (2006). Countering Punitiveness: Understanding

they argue that these reform drivers—cost, effectiveness, and humaneness—constitute the primary foundations for our belief in restraint. They will be discussed under the headings of “crime reduction”, “social values”, and “cost.”

1.2.1 The ineffectiveness of prison as a crime reduction strategy

Doob and Webster (2018) suggest that one of the central roots of Canada’s commitment to restraint can be found in what they describe as “penal pessimism.” Simply put, this expression refers to “the lack of strong faith in the ability of sentencing and imprisonment to serve utilitarian goals such as rehabilitation, incapacitation, and deterrence.” This rejection of the belief that prison can reduce crime (either through its ability to ‘cure’, ‘confine’, or ‘dissuade’ criminals), the authors argue, has been a dominant theme in Canada since its confederation in 1867.⁸¹ More importantly for the current discussion, this longstanding recognition of the ineffectiveness of imprisonment in reducing crime undermines one of the strongest arguments put forward by governments generally to justify their continuing recourse to incarceration.

The government reports reviewed earlier certainly support the consensus that prison is more a “school of crime” than an effective tool of crime reduction. Indeed, the explicit statement of the 1977 *MacGuigan Report* that prison has failed to provide long-term protection for society (either through rehabilitation or deterrence/incapacitation) leaves little doubt surrounding this committee’s view of incarceration as an ineffective mechanism to reduce criminal activity. This recognition of the failure of prison to solve the problem of crime only becomes stronger over time.

Stability in Canada’s Imprisonment Rate. *Law & Society Review*, 40(2), 325–368; b) Doob, A.N., & Webster, C. M. (2015). The Harper revolution in criminal justice policy...and what comes next. *Policy Options*, 36(May), 24–31; c) Doob, A. N., & Webster, C. M. (2016). Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century. *Crime & Justice*, 45(1), 359–418; d) Doob, A.N. & Webster, C. M. (2015). The promise ahead: Using the past to guide reforms of Canada’s criminal justice system. *Justice Report*, 30(4), 6–9; e) Doob, A. N., & Webster, C. M. (2020). The real divide: When Alberta’s criminal justice policy is more progressive than that of the Trudeau government. *Justice Report*, 35(2); f) Webster & Doob, *supra* note 70; and g) Webster, C. M., & Doob, A. N. (2018). Penal optimism: Understanding American mass imprisonment from a Canadian perspective. In K. R. Reitz (Ed.), *American exceptionalism in crime and punishment*. Oxford University Press.

⁸¹ Doob & Webster, *supra* note 44 at p. 151.

In fact, during the 1980s, the CSC made a deliberate effort to distance penal policy from the notion that judges could, through sentencing, protect citizens from illicit behaviour. In assessing the traditional utilitarian justifications for sentencing (rehabilitation, deterrence, incapacitation), the Commission concluded that “the only assertion about the current utilitarian goals that was not undermined by the results of research was relative to the existence of some general effect of deterrence and incapacitation, the magnitude of which could not be precisely estimated.”⁸² However, arguably the strongest statement regarding the ineffectiveness of prison as a crime reduction strategy was delivered in 1993 by a House of Commons Standing Committee when it noted that “If locking up those who violate the law contributed to safer societies, then the United States should be the safest country in the world. In fact, the United States affords a glaring example of the limited impact that criminal justice responses may have on crime.”⁸³

And, in fact, the empirical evidence on the ineffectiveness of utilitarian objectives at sentencing in reducing crime provides a solid foundation for Canada’s penal pessimism. In terms of offender rehabilitation, for instance, Canadians—in contrast to Americans—were not shocked by Martinson’s declaration that “nothing works,”⁸⁴ in terms of the rehabilitative potential of imprisonment. Indeed, Canada has long accepted that prison was more likely to de-socialize than re-socialize inmates. Specifically, there has been a general acceptance that the experience of imprisonment is not conducive to social reintegration, and a widely shared recognition that any positive effects that might be associated with program delivery in prison are likely counteracted by the negative impact of incarceration itself (e.g., social isolation, loss of employment, damage to family relationships).

⁸² CSC, *supra* note 38 at p. 144.

⁸³ Government of Canada. (1993). *Crime prevention in Canada: Toward a national strategy* (12th Report of the Standing Committee on Justice and the Solicitor General (3rd session, 34th Parliament) at p. 2.

⁸⁴ Martinson, R. (1974). What works? Questions and answers about prison reform. *The Public Interest*, 35, 22–54.

And the research supporting such a pessimistic conclusion regarding the unlikely success of sentencing an offender to prison for rehabilitation is long and consistent.⁸⁵ In fact, this general statement would also apply to rehabilitative programs delivered in the community. Empirical evidence suggests that none are consistently associated with positive outcomes. While some non-custodial programs have been shown to reduce reoffending to a limited extent, others have demonstrated no impact, and some have made matters worse by increasing crime.⁸⁶

Having said this, while Canada has generally shown little faith in the ability of judges to rehabilitate offenders through sentencing, it continues to support rehabilitative programming while offenders are in prison. That is, we continue to leave space for the possibility that while incarcerated, offenders might take advantage of correctional programming that assists them in making life changes, and that those changes may reduce the likelihood of re-offending. In fact, Canada is well known for its empirical research on the rehabilitative possibilities of correctional programs.⁸⁷ Of course, we continue to maintain—even within the correctional environment—a very cautious hope (some might say 'leap of faith') in (very) modest positive effects in limited situations. In other words, some programs may work with some offenders, under some circumstances.

And deterrence-based strategies—which include both general and specific deterrence—do not fare much better when applied to sentencing. General deterrence

⁸⁵ See, for instance: Palmer, T. (1992). *The re-emergence of correctional intervention*. Sage Publications; Finn, P. (1998). Job Placement for Offenders in Relation to Recidivism. *Journal of Offender Rehabilitation*, 28(1/2):89-106; Bouffard, J. A., MacKenzie, D. L., & Hickman, L. J. (2000). Effectiveness of vocational educational and employment programs for adult offenders: A methodology-based analysis of the literature. *Journal of Offender Rehabilitation*, 31, 1–41; Cecil, D. K., Drapkin, D. A., MacKenzie, D. L., & Hickman, L. J. (2000). The effectiveness of adult basic education and life-skills programs in reducing recidivism: A review and assessment of the research. *Journal of Correctional Education*, 51, 207–226; Miethe, T. D., Lu, H., & Reese, E. (2000). Reintegrative shaming and recidivism risks in drug court: Explanations for some unexpected findings. *Crime & Delinquency*, 46, 522–541; Dugan, L., Nagin, D. S., & Rosenfeld, R. (2003). Exposure reduction or retaliation? The effects of domestic violence resources on intimate-partner homicide. *Law & Society Review*, 37, 169–198; Visser, C. A., & Travis, J. (2003). Transitions from Prison to Community: Understanding Individual Pathways. *Annual Review of Sociology*, 29(1), 89–113.

⁸⁶ Webster, C. M. (2004). Limits of Justice: The role of the criminal justice system in reducing crime. In B. Kidd & J. Phillips (Eds.), *Enforcement and Prevention to Civic Engagement: Research on community safety*. University of Toronto.

⁸⁷ See, for instance, Andrews, D. A., Zinger, I., Hoge, R. D., Bonta, J., Gendreau, P., & Cullen, F. T. (1990). Does correctional treatment work? A clinically relevant and psychologically informed meta-analysis. *Criminology*, 28(3), 369–404.

attempts to discourage potential offenders (from offending) through the (harsh) punishment of others; specific deterrence attempts to discourage the actual offender through (harsh) punishment from re-offending. Both assume offenders act as rational actors, weighing the costs and benefits of crime prior to taking action.⁸⁸ The theory is simple: sentences deter by making the consequences of crime punitive enough to outweigh potential benefits; increased punishments, using this logic, should result in increased deterrence (decreased crime).

Given its punitive nature, deterrence through increased sentence severity is generally associated with sentences of imprisonment, and much of the research in this area has focused on the impact of longer, or mandatory, prison sentences. However, efforts to evaluate the effect of increased penalties on criminal activity have identified several weaknesses inherent in theories of general deterrence. As a case in point, this crime reduction model assumes that people: are aware of the penalties for specific offences; always weigh the costs and benefits of their actions (as opposed to acting on impulse); and will perceive a reasonable likelihood of apprehension.⁸⁹ Yet empirical research has failed to find consistent or compelling support for any of these necessary conditions. Perhaps not surprisingly, an evaluation of early deterrence literature led the CSC to conclude in 1987 that “deterrence cannot be used, with empirical justification, to guide the imposition of sentences.”⁹⁰ Since then, a vast body of literature has been developed in the area of deterrence, and a number of comprehensive summaries have been produced.⁹¹ When dealing with general deterrence, the consensus within the academic community is that little to no empirical support has been found for the belief that harsher sentences deter crime.⁹²

⁸⁸ *Ibid* at p. 8.

⁸⁹ Webster, *supra* note 86 at pp. 10-11.

⁹⁰ CSC, *supra* note 38 at p. xxviii.

⁹¹ Doob, A. N., & Webster, C. M. (2003). “Sentence severity and crime: Accepting the null hypothesis.” In M. Tonry (Ed.), *Crime and Justice: A review of research* (Vol. 30, pp. 143–195). University of Chicago Press; and Webster, C. M., & Doob, A. N. (2012). Searching for Sasquatch: Deterrence of crime through sentence severity. In J. Petersilla & K. R. Reitz (Eds.), *Oxford handbook on sentencing and corrections* (pp. 173–195). Oxford University Press.

⁹² Doob & Webster, *ibid* at p. 188. Note: While the severity of punishment is not associated with a reduction in crime, there is some suggestion that the *certainty* of apprehension (and punishment) may have some impact. See Easton, S., & Piper, C. (2012). *Sentencing and punishment: The quest for justice* (Third). Oxford University Press, at p. 115-118.

Research examining specific deterrence suggests similar (or worse) results, especially when related to the use of imprisonment. Studies on the impact of imprisonment on reoffending suggest, for instance, that imprisonment—at best—has no effect on the likelihood an offender will reoffend, and—at worse—that it increases the likelihood of reoffending.⁹³ Other studies have reported similar discouraging outcomes, including the following:

- Imprisoned offenders are at least as likely to reoffend as those who receive non-custodial dispositions.⁹⁴
- Sentence duration (in prison) is not related to the likelihood of reoffending.⁹⁵
- Offenders who are imprisoned for the first time are more likely to reoffend than similar offenders who receive non-custodial dispositions.⁹⁶
- Drug offenders who are imprisoned are more likely to reoffend than those who are not.⁹⁷

Not only is there no compelling or consistent evidence to suggest that offenders are deterred from committing further offences as a result of harsh penalties, there is also a growing acknowledgment that the negative “collateral” effects of imprisonment extend to an offender’s immediate family, and possibly their community more generally.⁹⁸

⁹³ Nagin, D. S., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. In *Crime and Justice: A review of research* (Vol. 38). University of Chicago Press.

⁹⁴ Weatherburn, D. (2010). The effect of prison on adult re-offending. *Crime and Justice Bulletin* (New South Wales, Bureau of Crime, Statistics, and Research) 143; Lulham, R., Weatherburn, D., and Bartels, L. (2009). The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment. *Crime and Justice Bulletin*, 136; Mears, D. P., Cochran, J.C., and Bales, W.D. (2012). Gender differences in the effects of prison on recidivism. *Journal of Criminal Justice*, 40, 370-378.

⁹⁵ Snodgrass, G. M., Arjan A. J., Blokland, A. H., Nieuwbeerta, P., and Nagin, D. S. (2011). Does the time cause the crime? An examination of the relationship between time served and reoffending in the Netherlands. *Criminology*, 49(4), 1149-1194.

⁹⁶ Nieuwbeerta, P., Nagin, D. S., & Blokland, A. A. (2009). Assessing the impact of first-time imprisonment on offenders’ subsequent criminal career development: A matched sample comparison. *Journal of Quantitative Criminology*, 25, 227–257.

⁹⁷ Spohn, C., & Holleran, D. (2002). The effect of imprisonment on recidivism rates of felony offenders: A focus on drug offenders. *Criminology*, 40, 329–357.

⁹⁸ For instance, the incarceration of a mother or father has a negative impact on their children. See Van de Rakt, M., Murray, J., & Nieuwbeerta, P. (2012). The long-term effects of paternal imprisonment on criminal trajectories of children. *Journal of Research in Crime & Delinquency*, 49(1), 81–108.

Like other sentencing objectives, incapacitation has a common-sense appeal as a strategy of crime reduction. After all, when offenders are in prison, they are not committing offences in the community. Aside from the questionable ethics of imprisoning people for what they may do in the future, this logic is faulty for several reasons. First, the offender will eventually get out, and will often be more likely to reoffend at that point. This longer-term effect can outweigh any “benefit” gained during their incarceration. Second, for many offence types (e.g., drug production or trafficking), it is likely that the incarcerated offender would simply be replaced in the community, eliminating any reduced criminal activity. Finally, current risk assessment models do not reliably predict future offending rates. By relying on past behaviour, offenders are likely to be predicted to be at risk for future offending later in life precisely when their offending rate is often declining.⁹⁹ Put another way,

While seductive in its simplistic elegance, this criminal justice strategy is predicated on the [erroneous] belief that high-rate offenders can be prospectively identified and incarcerated sufficiently early in their careers to reap the incapacitative benefit of crime reduction.¹⁰⁰

In brief, Canada’s longstanding penal pessimism appears to be well founded. Despite decades of empirical research, no credible and consistent body of empirical evidence has been found to support the use of imprisonment as an effective crime reduction strategy (either through rehabilitation, deterrence, or incapacitation). In fact, the CSC was so concerned about the codification of such unrealistic sentencing objectives (at least in terms of reducing criminal activity), that it elected to distinguish between the goals of sentencing and the broader goals of the criminal justice system. The overall goal of the criminal justice system, it recommended, should be the protection of society; the purpose of sentencing should be much narrower: “to preserve the authority of and promote respect for the law through the imposition of just sanctions.”¹⁰¹ While utilitarian objectives were not dismissed, the CSC recommended that primacy be given to the principle of proportionality.

⁹⁹ Bersani, B. E., Nieuwbeerta, P., & Laub, J. H. (2009). Predicting trajectories of offending over the life course: Findings from a Dutch conviction cohort. *Journal of Research in Crime & Delinquency*, 46(4), 468–494.

¹⁰⁰ Webster, *supra* note 86 at p. 5.

¹⁰¹ CSC, *supra* note 38 at p. 151 (Rec #6.1)

By the 1990s, this notion of penal pessimism was firmly established in Canadian formal reports. Some might argue that it became even more clearly articulated in the last decade of the 20th century. As a case in point, one of the government discussion papers made the following admission:

We do not at present have the means or the knowledge to drastically reduce crime or rehabilitate all offenders. We can, however, seek to reduce or mitigate the social costs of crime, punish offenders, and create programs, opportunities and incentives for treatment for those we think might respond so that they are not an ongoing burden to society.¹⁰²

Similarly, Webster and Doob (2018) affirm—based on a review of government reports from the 1980s and 1990s—that Canada’s overall position on sentencing during this era acknowledged the criminal justice system’s limited ability to solve crime. Specifically, “[p]olicies related to sentencing and imprisonment had, at that point in Canada’s history, been successfully separated from crime prevention.”¹⁰³

Of course, there is always the exception to the rule. Between 2006 and 2015 criminal justice policy in Canada took a decidedly punitive turn. Stephen Harper’s Conservative government reversed decades of belief in the ineffectiveness of prison as a crime reduction strategy. Up until then, an over-reliance on incarceration was seen as a “Bad Thing.”¹⁰⁴ During this more recent period, we witnessed a virtual “punishment tsunami” of harsh crime bills that explicitly endorsed the effectiveness of incapacitation and deterrence.¹⁰⁵ Pragmatic concerns around the need to reduce the use of imprisonment were replaced by a rhetoric of punishment that was more emotionally satisfying to a willing public. The number of mandatory minimum penalties increased, and significant restrictions were placed on the use of conditional sentences. Indeed, after decades of criminal justice policies that promoted restraint, the new message—at least for the better part of a decade in Canada—was that “prison works in reducing

¹⁰² Government of Canada. (1990). *Directions for reform: A framework for sentencing, corrections and conditional release* (p. 32). Solicitor General of Canada, at p. 8.

¹⁰³ Doob & Webster, *supra* note 44 at p. 163.

¹⁰⁴ Tonry, M. (2011). Making peace, not a desert. *Criminology & Public Policy*, 10(3), at p. 647.

¹⁰⁵ Webster & Doob, *supra* note 40 at p. 361.

crime.... [whereby] [r]estraint was largely replaced with excess; moderation with severity.”¹⁰⁶

While the current Liberal government has clearly distanced itself from this type of punitive rhetoric, it has yet to take any decisive action to reverse much of the harsh legislation introduced by the Harper government. What has changed—one might argue—is that the current government has demonstrated a (timid) return to Canada’s longstanding penal pessimism. More importantly for our current purposes though, the Harper era reminds us that while Canada has largely heeded the empirical evidence regarding the ineffectiveness of utilitarian sentencing objectives in reducing crime, the intuitive appeal of crime reduction through rehabilitation, deterrence, or incapacitation is never far from the surface. Indeed, these sentencing objectives are so ingrained in our collective psyches that they have always remained part of the discourse on sentencing. Symptomatically, it was recognition of the emotional role played by these goals that led the CSC to not eliminate them from their proposed purposes and principles of sentencing. As this Commission astutely recognized,

Even if punishment cannot ultimately be justified, it apparently satisfies a strong desire, seated both in moral thinking and human emotions, and it cannot be renounced. There is consequently a natural tendency to compensate for the limits of retributivism by attributing to penal sanctions an efficiency in preventing crime which they do not really possess.¹⁰⁷

1.2.2 The incongruence of an over-reliance on imprisonment with Canadian social values

Not only have Canadians been generally skeptical of the effectiveness of punitive sanctions in reducing crime, they tend to lack—on an individual level—“the moral taste for harshness.”¹⁰⁸ Studies have repeatedly suggested that the Canadian public, especially when provided with details of criminal cases, are quite accepting of non-

¹⁰⁶ Webster & Doob, *supra* note 70 at p. 312. More recently, Doob & Webster have suggested that 2006 represented a policy shift whose first harbingers were apparent as early as 1996. See Webster & Doob, *ibid* at p. 356.

¹⁰⁷ CSC, *supra* note 38 at p. 145.

¹⁰⁸ Webster, C. M., & Doob, A. N. (2007). Punitive Trends and Stable Imprisonment Rates in Canada. *Crime & Justice*, 36, 297–369 at p. 348.

custodial sanctions, including for less serious cases of violence.¹⁰⁹ It is possible that this reflects underlying cultural and/or social values that promote tolerance and compassion. Certainly, this explanation would be consistent with government and public support for the development and expansion of “problem-solving” courts in Canada.¹¹⁰ In a recent National Survey (2017), participant responses suggested a thoughtful approach to the issue of sentencing:

At the same time, most participants felt that the best approach to prevent crime is to address root causes, particularly during impressionable stages of an individual’s life, through means such as social programs and support systems. Stronger sentences and punishment were not viewed by most focus group participants as an effective way to dissuade individuals from committing crime.¹¹¹

In focus groups conducted after the survey, there was strong support for the criminal justice system taking mental illness and intellectual challenges into consideration. Participants also identified “a need for a more integrated system that increases options for health and social support for offenders with these challenges.”¹¹²

As Webster and Doob (2015) point out, criminal justice policy sets the tone and provides a normative framework; the criminal law, especially, acts to underline values that are important to society. Until at least 2006, crime was seen as being socially determined, and “there was broad consensus...about those underlying values. ...compassion, inclusion, reintegration, restraint, rehabilitation, and moderation.”¹¹³ The

¹⁰⁹ Research suggests that the more the public knows about specific issues or sentence results, the more positive their attitudes regarding the outcome. See, generally, Doob, A. N. (2000). Transforming the punishment environment: Understanding public views of what should be accomplished at sentencing. *Canadian Journal of Criminology*, 42(3), 323-340; Roberts, J. V., Crutcher, N., & Verbrugge, P. (2007). Public attitudes to sentencing in Canada: Exploring recent findings. *Canadian Journal of Criminology & Criminal Justice*, 49(1), 75-107; Varma, K. N., & Marinos, V. (2013). Three Decades of Public Attitudes Research on Crime and Punishment in Canada. *Canadian Journal of Criminology & Criminal Justice*, 55(4), 549–562.

¹¹⁰ Department of Justice. (2018). *National Justice Survey 2017: Issues in Canada’s Criminal Justice System* (p. 116) (Final report). Department of Justice, at p. 34. Survey participants generally supported problem-solving approaches in the criminal justice system. Over half of the respondents (58%) said they would like to see such models promoted in Canada; 30% reported moderate support (only 9% thought problem-solving approaches were not appropriate when dealing with crime).

¹¹¹ Department of Justice. (2017). *National Justice Survey: Canada’s Criminal Justice System* (Synthesis report). Department of Justice Canada, at p. vi.

¹¹² *Ibid* at p. vi.

¹¹³ Webster & Doob, *supra* note 70 at p. 308.

acceptance of such communitarian values, and the idea that crime is a community (not individual) concern, also informed beliefs regarding the root causes of crime, and by extension, their remedies. Giving the keynote address at a 1995 conference, the Minister of Justice made the following public comments on the issue of crime and public perceptions:

Making streets safer has as much to do with literacy as it does with the law; with the strength of families as with the length of sentences; and with early intervention as with mandatory supervision. If crime prevention is going to be effective, it has to be based on linkages between law enforcement and social agencies, between the educational system and families, and between community workers and health care professionals.¹¹⁴

And, in fact, there appears to be some—albeit speculative—empirical support for the link between Canadians’ longstanding belief in restraint in the use of imprisonment and wider cultural values. This may be tied, at least in part, to our tendency to shun attempts to follow the United States in our approach to criminal justice. Indeed, Webster and Doob (2007) identify the rejection of “Americanized models” as an important feature in Canada’s cultural identity, though they argue that it would be simplistic to suggest that Canadian culture is defined only as that which is in opposition to the United States.¹¹⁵ Relying upon research that incorporated extensive polling data, Webster and Doob suggest that the core values of Canadians and Americans differ in fundamental ways, and that the underlying values of the two groups can be linked to their respective imprisonment rates.¹¹⁶

Specifically, values deemed to be “most Canadian” were captured under the heading of “idealism and autonomy.” These included a greater tolerance for non-traditional views, a level of comfort with adapting to change, and a tendency not to feel threatened by social change. Americans (or “least Canadian”), on the other hand, were more likely to be associated with values reflecting “status and security”—for example, the belief that rules should be followed, immigrants should blend it, and people get what

¹¹⁴ The Honourable Allan Rock. (1996). Keynote address: Crime, punishment and public expectations. *Public Perceptions of the Administration of Justice—Papers presented at the CIAJ conference held Oct 11-14, 1995, in Banff, Alberta* at p. 192.

¹¹⁵ Webster & Doob, *supra* note 108 at p. 350.

¹¹⁶ *Ibid* at pp. 350-353. Webster & Doob are relying on research conducted by Adams. See Adams, M. (2003). *Fire and Ice: The United States, Canada, and the myth of converging values*. Penguin Canada.

they deserve as a result of the decisions they make. When different American regions are compared in terms of their use of imprisonment and the degree to which they are more or less “Canadian-like”, the states that were more like Canada in terms of social/cultural values had lower imprisonment rates than those that were less like Canada.¹¹⁷ This finding provides some level of support for the notion that imprisonment rates reflect, in part, the underlying values of the jurisdiction. Indeed, as Webster and Doob note, “Canadian culture appears to be largely rooted in more nonviolent, communitarian values that may not be supportive of increasing punitive responses to criminal behavior.”¹¹⁸

During the Harper decade (2006-2015), the underlying belief in the social causes of crime was challenged by suggestions that crime was the result, instead, of rational choices made by individuals. Certainly, in terms of the *political* rhetoric, it would appear that “compassion for offenders [was] replaced by ambivalence.”¹¹⁹ However, even in this case, it is not clear whether this punitive rhetoric was intended to actually change the core values held by most Canadians. As Adams (2014) points out, Harper’s harsher policies may not have been intended to sway moderates or progressives but, rather, to take advantage of an aggrieved and bitter (minority) voting block for political gain.¹²⁰ Using language not unfamiliar to any who have followed the rise of right-wing political movements in recent years, Adams reminds us that “Conservatives are happy to nurture the resentments that decades of multi-party elite consensus [have] sown, to judiciously dole out politically incorrect red meat and to reap the political rewards.”¹²¹ And, in fact, it is important to note is that there is no evidence that Canadian core values (e.g., moderation, compassion, inclusion, etc.) actually changed as a result of the Harper era.¹²² It is possible that at least part of the explanation resides in the fact that, at most,

¹¹⁷ *Ibid* at p. 352.

¹¹⁸ *Ibid* at p. 353.

¹¹⁹ Webster & Doob, *supra* note 70 at p. 311.

¹²⁰ Adams, M. (2014). The Harper government has made a tough stance on crime one of its showcase positions. Why? *Policy Options*. <https://policyoptions.irpp.org/magazines/beautiful-data/adams/>

¹²¹ *Ibid* at p. 5. On the issue of “political pandering” see also Webster & Doob, *supra* note 40 at p. 363.

¹²² In fact, when Justin Trudeau formed a majority Liberal government in 2015, his mandate letter to the Attorney General was decidedly non-punitive, calling upon her, for instance, to review the

the voting block targeted by the punitive rhetoric—and receptive to it—represented a relatively small minority of Canadians.

1.2.3 The financial cost of imprisonment

In the post-recession 1990s, all levels of government in Canada were dealing with the need for fiscal restraint. Demands on budgets in many areas were increasing, budgets were not. This included justice spending (police, courts, corrections, legal aid, prosecutions), which saw a 13% constant dollar increase between 1988 and 1995.¹²³ In 1994/1995 the average daily count of adult offenders in either provincial or federal custody was 33,759.¹²⁴ Of the \$10 billion allocated to justice spending in that fiscal year, approximately 15% (\$1.5 billion) funded adult correctional (in custody) populations.¹²⁵ The cost of keeping inmates behind bars has always been substantial. In the mid-1990s the average cost of housing a federal inmate was \$121 per day; at the provincial/territorial level the cost was \$107 per day.¹²⁶ Even at the lower amount, in 1994/1995 this represented a cost (borne by the provinces/territories) of \$39,055 per year for each inmate.

sentencing reforms made over the (Harper) decade “to assess the changes, ensure that we are increasing the safety of our communities, getting value for money, addressing gaps and ensuring that current provisions are aligned with the objectives of the criminal justice system.” The Prime Minister made specific mention of his interest in outcomes that increased the use of restorative justice processes “and other initiatives to reduce the rate of incarceration amongst Indigenous Canadians.” See Mandate Letter, *supra* note 26.

¹²³ Statistics Canada. (1997). *Justice Spending in Canada 1994/1995* (Juristat: Canadian Centre for Justice Statistics No. 85-002-XPE no. 3). Statistics Canada, at p. 4. Note: Constant dollar calculations used 1986 as the base year (at p. 3).

¹²⁴ Statistics Canada. (1997). *Adult correctional services in Canada, 1995-96*, by M. Reed & P. Morrison, in Juristat:17:4, No. 85-002-XPE. (Ottawa: Statistics Canada), at p. 4.

¹²⁵ Statistics Canada, *supra* note 123 at p. 9 (Table 1).

¹²⁶ More recent (2017/2018) estimates of the financial cost of holding an offender in custody report an average of \$330 per day for each inmate in federal custody, and an average of \$233 per day per inmate in provincial/territorial custody. See Statistics Canada. (2019). *Adult and youth correctional statistics in Canada, 2017/2018*, by Jamil Malakieh, in Juristat: Canadian Centre for Justice Statistics No. 85-002-X; p. 26. (Ottawa: Statistics Canada) at p. 22.

In contrast, costs for supervising offenders in the community are extremely low, with a reported rate for Ontario of \$5.81 per day cost for 2014/15 (source: Office of the Auditor General of Ontario. (2014). *Annual Report of the Office of the Auditor General of Ontario*, at 67). BC reports an average of \$7.25 per day per offender for 2016/17 (source: Ministry of Public Safety and Solicitor General. (2017). *A Profile of BC Corrections: Reduce Reoffending, Protect Communities – 2017*, at 3).

Not surprisingly, the mid-1990s saw rising concerns about increasing correctional caseloads (with their associated funding requirements). Between 1990 and 1996, the average actual custodial count in Canada saw increases each year at both the federal and provincial/territorial levels, with a 15.6% increase overall. This represented a 10.6% overall increase in the number of custodial admissions (from 212,242 in 1990/1991 to 234,732 in 1995/1996).¹²⁷ While cost-saving measures were put in place in many provinces/territories (e.g., the “double-bunking” of adult inmates, privatization of certain services, staff reductions through the use of technology, and facility sharing agreements between levels of government), they were simply insufficient.

Importantly, the economic solution was not to reduce the average cost of housing each inmate. Rather, it was to reduce the number of inmates housed (prison reduction).¹²⁸ Indeed, when the federal, provincial, and territorial Justice Ministers (and others) met in 1995 to discuss concerns around growing prison populations, cost issues were clearly front of mind: “most jurisdictions were experiencing growing correctional populations and concern was expressed that this growth threatened to outstrip available capacity and resources during a time when government resources continue to decline.”¹²⁹ And so, while humanitarian or utilitarian concerns may have been considerations, they were not the only pressures being responded to at that point.

It is worth noting that the 11 recommendations released by the Federal/Provincial/Territorial ministers (in the 1997 report) reflected an uncharacteristic level of unanimity, given the broad range of political parties represented. Their shared interest in prison reduction efforts can be seen in recommendations that endorsed: making greater use of diversion programs and other alternatives measures; “de-incarcerating” low-risk offenders; and increasing the use of restorative justice and mediation approaches. The clear link between efforts to reduce the use of imprisonment and the need to reduce (or not increase) financial costs is apparent in the fourth (and final) report in this series.

¹²⁷ Public Safety Canada. (1997). *Corrections population growth: First report on progress for Federal/Provincial/Territorial Ministers Responsible for Justice*. Public Safety Canada, at p. 5 (Annex B- Table 3).

¹²⁸ Statistics Canada, *supra* note 123 at p. 8.

¹²⁹ Public Safety Canada, *supra* note 127 at p. 1.

The working group recognized that incarceration is appropriate for many offenders, but for others it is unnecessary and ineffective, even counterproductive. Being the most expensive of correctional programs, it was recognized that less expensive and at least equally effective measures were necessary to allow increased resources to be concentrated on the most serious offenders.¹³⁰

The province of Alberta—the most Conservative jurisdiction in Canada—offers an instructive lesson on the ability of economic pressure to obtain meaningful change in the use of imprisonment. In the mid-1990s, the Conservative premier cut expenditures quite drastically to balance the budget, as he had promised to do. This included substantial reductions in the justice ministry, which resulted in policy changes that had the effect of reducing, by almost 32% in four years (1993-1997), the number of offenders incarcerated in provincial institutions.¹³¹ As it turned out, pursuing decarceration as a political solution would appear—at least in this case—to be more effective than efforts to achieve decarceration as a policy-based solution, linked to criminal justice goals.

Notably, key to the successful prison reduction in Alberta was the lack of political or public opposition to the plan. This was in part due to the attention being paid to more controversial cuts made in health and education. Faced with a 21% budget reduction in the first two years, and 31% in the second two years (1997/1998), civil servants in Justice were given considerable latitude when designing cost reduction strategies.¹³² While the goal was economical (cost cutting), it is notable that the decarceration that resulted was also largely consistent with established (and often progressive) criminal justice policy goals. “The combination of this ‘freedom’ to craft policy and the liberal orientation of the civil servants was central in decreasing Alberta’s prison population.”¹³³ The changes introduced included closing prisons and encouraging, whenever possible, the use of non-custodial options. Focusing on restraint in the use of imprisonment as a cost-cutting strategy had the effect of reducing financial costs and reducing actual

¹³⁰ Public Safety Canada. (2000). *Corrections population report: Fourth edition* [Final]. Public Safety Canada, at p.2. It is notable that the final report signals a shift in concern—from sentenced custody to remand admissions. “In addition, Provincial and Territorial remand populations continue to rise. Recently efforts have been made to better understand these dynamics” (at p. 2).

¹³¹ Webster & Doob, *supra* note 7 at p. 5.

¹³² *Ibid* at p. 17.

¹³³ *Ibid* at p. 18.

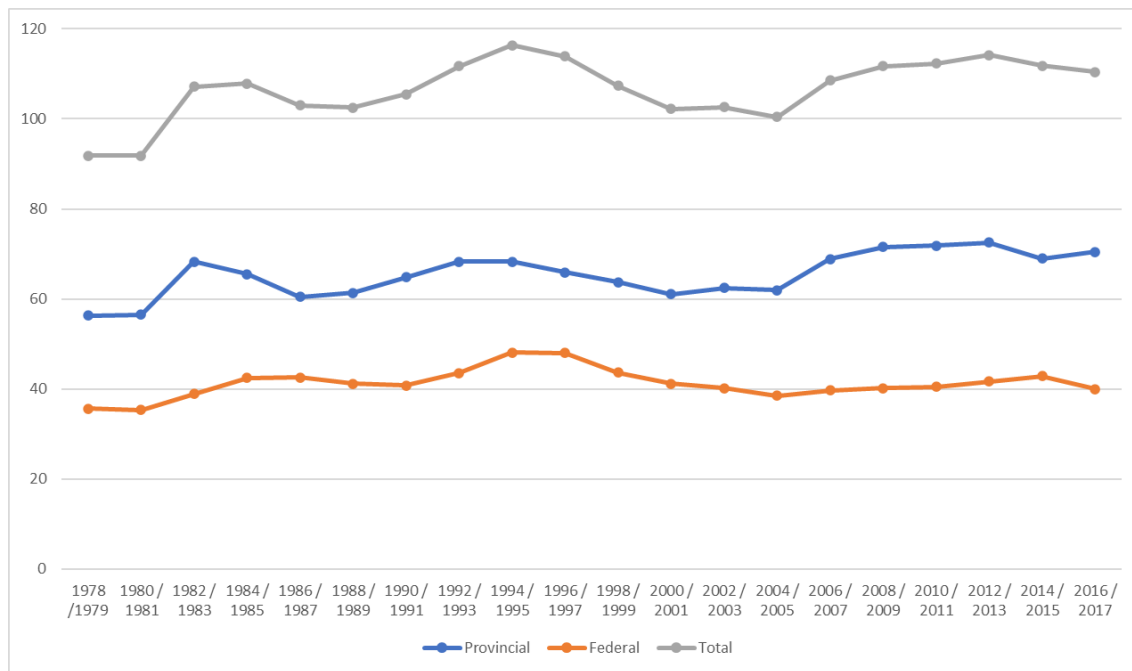
imprisonment. Though not driven by policy goals, specific programs and outcomes were generally consistent with criminological theory, nonetheless.

1.3 Manifestations of restraint and trends of imprisonment

Despite the historically entrenched commitment to restraint that has guided criminal justice policy through the 20th century, Canada has been unable to reduce its overall adult imprisonment rate in any meaningful way. Rather, these rates have demonstrated relative stability over time in spite of a lack of faith in the ability of imprisonment, in particular, to serve utilitarian goals. Moreover, it has ensued notwithstanding long-held social and cultural values of communitarianism as well as concerns—particularly at the provincial/territorial level—with the high financial costs associated with incarceration. In fact, Canada’s overall imprisonment rates have remained relatively stable for (at least)¹³⁴ half a century (see Figure 1-1). Notably though, there have clearly been some fluctuations over time—with a low of 92 per 100,000 population in 1980/1981 and a high of 116 in 1994/1995.

¹³⁴ Webster & Doob extend Canada’s stable imprisonment rate back as far as the early 1950s. See Webster & Doob, *supra* note 40 at p. 360 (Figure 17.2).

Figure 1-1 Canadian imprisonment rates: Total, federal, and provincial/territorial adult imprisonment rates per 100,000 population (1978/79 to 2016/17)¹³⁵



While one might be tempted to conclude that Canada has failed to honour its longstanding principle of restraint, it is possible that this lack of change can, itself, be viewed as evidence of restraint. Two arguments are offered in support of this position. On the one hand, one needs to evaluate this stability within the wider context of increases in the use of imprisonment in other countries. On the other hand, one also needs to evaluate it within the context of internal policy changes that were expected to increase the use of imprisonment in Canada. In either case, Canadian stability is notable in that it reflects the system's resistance to wider (external or internal) forces promoting policies that are inconsistent with the notion of restraint.

Indeed, from an international perspective, we have seen rising imprisonment rates in other comparative nations. In fact, Canadian levels of incarceration have been

¹³⁵ Data for this figure come from: Statistics Canada, Canadian Socio-Economic Information Management System (CANSIM): Average counts of adults in provincial and territorial correctional programs, Table 35-10-0154-01 (formerly CANSIM 251-0005); Average counts of offenders in federal programs, Canada, Table 35-10-0155-01 (formerly CANSIM 251-0006); and Population estimates, Table 17-0005-01 (formerly CANSIM 051-0001).

described as a notable anomaly, particularly within English-speaking nations.¹³⁶ One would need only to compare the change in imprisonment rates between 2000 and 2015 in England/Wales (124 to 148), Scotland (116 to 144), Australia (114 to 152), and New Zealand (148-192), to that of Canada (115-114) to make the point.¹³⁷ For a more dramatic effect, consider Canadian rates alongside those of its closest neighbour, the United States. As Webster and Doob (2018) note, both countries showed relative stability in their imprisonment rates from 1930 to 1970, but then began to diverge substantially in the mid-1970s. While Canada's levels remained relatively stable, the American rate "skyrocketed" from approximately 170 per 100,000 residents in 1975 to over 700 in 2010.¹³⁸

But even from a national perspective, the (one might say unexpected) stability of Canadian imprisonment rates—particularly between 2006 and 2015—suggests that the sentencing culture was largely able to resist the tough-on-crime policies that characterized the early 21st century.¹³⁹ The Conservative push towards punitiveness included legislative reforms, certainly, but also a rhetorical shift that promoted harsh penalties as effective strategies for crime reduction. In fact, mathematical modelling at the time warned of "very high costs in financial, social and human terms," suggesting that the tough-on-crime agenda would result in "the lengthy incarceration of thousands of additional offenders under harsh conditions."¹⁴⁰

¹³⁶ Doob & Webster, *supra* note 80(a) at p. 326; More recently, see Doob & Webster, *supra* note 70 at p. 300.

¹³⁷ Walmsley, R. (2018). *World prison population list (12th ed)* (p. 19). Institute for criminal policy research (ICPR). Rates per 100,000 population.
https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl_12.pdf

¹³⁸ Webster & Doob, *supra* note 44 at pp. 122-123 (Figure 3.1).

¹³⁹ The Conservative government enacted 42 crime bills while in power—all directed towards a greater punitiveness. For details, see Doob & Webster, *supra* note 80(c) at p. 385 (Table 1).

Many of the policies pursued by the Harper Conservative government between 2006 and 2015 were consistent with developments in other countries—for example, increased use of mandatory minimum sentences, restrictions on the availability of non-custodial sanctions, reduced eligibility for parole or credit for time served, etc.

¹⁴⁰ Mallea, P. (2010). *The fear factor: Stephen Harper's "Touch on crime" agenda* (p. 58). Canadian Centre for Policy Alternatives (CCPA), at p. 24. Notably, part of this predicted increase was believed to come from the 2006 restrictions on conditional sentencing. Specifically, the report of the Parliamentary Budget Officer (PBO) suggested that if the restrictions were applied to the 2008/2009 national caseload, the result would have been an additional 3,818 offenders incarcerated, for an estimated 858,679 days (an average of 225 days per offender). See Yalkin,

Notwithstanding such predictions, the Canadian adult imprisonment rate remained essentially unchanged throughout this period (see above Figure 1-1).¹⁴¹ Doob and Webster (2016) speculate on a number of possible explanations for the relative stability of imprisonment rates over these years. Perhaps one of the most intriguing within the context of the current study is that judges may have moderated some of the more punitive impacts through the development of practices intended to circumvent what were seen as “unjustifiably harsh or unfair laws.” Three possible strategies are identified: 1) judges can find laws to be unconstitutional; 2) they can interpret law benevolently, to the advantage of the offender; or 3) they can ignore parliamentary intention and compensate in other ways.¹⁴² More broadly, this proposed explanation highlights the critical role of the judiciary in shaping sentencing policy.

Another contribution to the relative stability of Canada’s imprisonment rates between 2006 and 2015 may be found in the belief that the tough-on-crime reforms were more symbolic than instrumental. While some of the new legislative provisions had a small impact on a lot of people, most of the reforms with “large impacts” (e.g., mandatory minimum jail terms or the restrictions on conditional sentences) affected a relatively small group of offenders.¹⁴³ In fact, Doob and Webster suggest that the goal might not have been to actually increase punishment severity. Rather, the Harper government may simply have wanted to look tough, without being particularly concerned with “how coherent, principled, or harsh the criminal justice system actually was.”¹⁴⁴ Nonetheless, there clearly were some punitive policies that resulted in the imprisonment of offenders

T. R., & Kirk, M. (2012). *The fiscal impact of changes to eligibility for conditional sentences of imprisonment in Canada* (p. 89). Office of the Parliamentary Budget Officer, at p. 54.

¹⁴¹ In fact, the only dramatic change observed in Canadian imprisonment rates occurred in the wake of the 2002 enactment of the *Youth Criminal Justice Act* (YCJA), legislation that included “clear operational principles designed to screen cases away from court and to restrict the use of custody.” The youth imprisonment rate went from 192 per 100,000 youths in 1997, to 51 per 100,000 in 2015, representing a 73% reduction. See Webster & Doob, *supra* note 75 at p. 1107.

¹⁴² Doob & Webster, *supra* note 80(c) at p. 403.

¹⁴³ *Ibid* at p. 391.

¹⁴⁴ *Ibid* at p. 410. The darker interpretation of this explanation is that the intention was not to make the *system* more punitive but, rather, to change public values—e.g., to change the social welfare orientation held by many Canadians. “Canadian Conservatives may have been using crime policy as a mechanism to reinforce conservative values related to individual responsibility in all aspects of life” (at p. 411).

who otherwise would have received a non-custodial disposition, even if there were fewer than anticipated.¹⁴⁵

Regardless, the authors optimistically predict that “the Harper era in sentencing policy in the end may have been a short-term blip in an otherwise historically entrenched commitment to restraint in the use of imprisonment.”¹⁴⁶ So far, it would appear that they were right, at least to the extent that the Harper policies generally do not seem to have resulted in sustained rhetorical or actual changes in criminal justice policy. What is perhaps less certain, is whether any of the specific criminal justice reforms that this past government introduced (e.g., mandatory minimum penalties) will have a continuing impact. Certainly, this possibility is raised within the context of the significant restrictions the Harper government placed on the use of conditional sentences.

While it is unclear whether the current government has an appetite to reverse the specific constraints on conditional sentences, it would seem that the judiciary may have an interest in doing so.¹⁴⁷ In *R. v. Sharma*, the Ontario Court of Appeal responded to the limits placed on judicial discretion by effectively removing the restrictions.¹⁴⁸ At this point, it is difficult to predict what might be in store for conditional sentences as we move forward. Will the limitations that effectively neutered the sanction be upheld by the Supreme Court of Canada, or will we go back to a time when conditional sentences were available for more serious offences? If it is the latter, with no other changes, should we

¹⁴⁵ In its assessment of the impact of the conditional sentencing restrictions alone (not including MMPs), the Parliamentary Budget Officer (PBO) estimated that in 2008/2009, 4,468 cases that received conditional sentences would no longer be eligible for that sanction. Even allowing for the estimated 650 acquittals (after trial), this would presumably represent 3,818 “new” terms of imprisonment. See Yalkin & Kirk, *supra* note 140 at p. 36.

¹⁴⁶ Doob & Webster, *supra* note 80(c) at p. 415. While Harper’s Conservative government took punitive policies the furthest, it is important to note that past Liberal governments had pursued similar strategies—e.g., Bill C-70, legislation that did not pass, but which would have made many categories of offences ineligible for conditional sentences unless the court was “satisfied that it is in the interests of justice to do so because of exceptional circumstances. Bill C-70, *An Act to amend the Criminal Code (conditional sentence of imprisonment)*. First reading October 27, 2005 (Canada, 38th Parl., 1st Sess.).

More importantly, as Webster and Doob point out, all three national parties supported tough-on-crime platforms during the 2006 and 2008 elections. Similarly, opposition parties either failed to moderate, or explicitly supported, harsh sentencing policies during the Conservative minority government (2006-2011). See Webster & Doob, *supra* note 70.

¹⁴⁷ It would be consistent with the appellate courts’ willingness to address other Conservative tough-on-crime policies—e.g., MMPs, victim surcharges, credit for time served, etc.

¹⁴⁸ *Sharma*, *supra* note 4.

expect a different outcome? Indeed, Einstein's definition of insanity as "doing the same thing over and over again and expecting different results" comes to mind.

If nothing else, these questions underline the need to re-visit the conditional sentence as one of the central strategies adopted to reduce Canada's reliance on imprisonment as a criminal sanction. However, this exercise cannot simply be focused on where we are now. Rather, it also demands an understanding of history. To borrow from a well-known civil rights activist, "You can't really know where you are going until you know where you have been" (Angelou, n.d.). To this end, we need to have a much better appreciation of, as well as insight into, the history of the conditional sentence in Canada.

2 The rise (and fall) of the conditional sentence

Chapter 1 introduced restraint as a core principle entrenched within Canadian criminal justice policy, one that was elevated by its codification in 1996. Bill C-41, the legislation that established restraint as one of the principles of sentencing, also created the conditional sentence—a non-custodial sanction that allows offenders to serve terms of imprisonment (of less than two years) in the community. The clear purpose of the sanction was to reduce the use of traditional incarceration in Canada.¹⁴⁹ Indeed, this new sentencing option can be seen as a natural extension or concrete translation of our longstanding belief in restraint in the use of imprisonment. There was a sense of optimism in the sanction's early days, as reflected in Roberts' observation (in 1997) that conditional sentences had already shown themselves to be popular with the judiciary, and "[had] the potential to make a significant contribution to reducing Canada's reliance on incarceration as a sanction."¹⁵⁰ At the same time, however, there were a number of known (or anticipated) challenges that would have to be addressed if the sanction was to be an effective mechanism for prison reduction.¹⁵¹

The following section explores the conditional sentence within the context of restraint, and as influenced by the political events and judicial decisions of the past twenty-plus years. The first part (2.1) focuses on the creation of conditional sentences

¹⁴⁹ See, generally, the early literature on conditional sentencing in Canada: a) Gemmell, J. (1997). The new conditional sentencing regime. *Criminal Law Quarterly*, 39, 334–361; b) Manson, A. (1997a). Finding a place for conditional sentences. *Criminal Reports (5th)*, 3, 283–300; c) Manson, A. (1997). The appeal of conditional sentences of imprisonment. *Criminal Reports (5th)*, 5, 279–290; d) Manson, A. (1997). Canada's new conditional sentence: Will it replace incarceration or probation? *Federal Sentencing Reporter*, 9(5), 250–255; e) Roberts, J. V., & von Hirsch, A. (1998). Conditional sentences of imprisonment and the fundamental principle of proportionality in sentencing. *Criminal Reports (5th)*, 10, 222–231.

¹⁵⁰ Roberts, J. V. (1997). Conditional sentencing: Sword of Damocles or Pandora's Box? *Canadian Criminal Law Review*, 2, 183–204, at p. 184. The sanction's potential to achieve substantive reductions in the use of imprisonment was linked to the fact that, at the time, the two-year ceiling for conditional sentences made it available, not just for summary offences but, rather, for almost all offences, including many that would have likely attracted prison sentences in the past. Prior to the 1996 reforms, for example, 89% of the prison sentences imposed for sexual assault were for periods under two years. Similar patterns were evident for assault with a weapon, break and enter, and drug trafficking, with over 95% of the prison terms imposed on these offences being for terms of less than two years (and therefore eligible for conditional sentences post Bill C-41); see Appendix A at p. 205 "Use of incarceration, nine jurisdictions, 1993 & 1994."

¹⁵¹ *Ibid* at p. 185.

within the broader legislative agenda captured by Bill C-41. Notably, even as it emerged from the parliamentary womb, the sanction was burdened by concerns regarding its unfortunate construction that threatened to effectively neutralize conditional sentences as tools for prison reduction. To use a driving metaphor, the warning light on the dashboard was blinking yellow.

The early years of conditional sentencing were characterized by a sense of hesitancy and inconsistency in terms of the sanction's appropriate application. Indeed, it is difficult to imagine the continued functioning of conditional sentences but for the Supreme Court's efforts to salvage the sanction in 2000. The second part of this section (2.2) considers the post-*Proulx* challenges of conditional sentencing, suggesting that while the decision may have saved conditional sentences in the short-term, it arguably did considerable (unintended) damage in the longer-term. The warning light transitioned from yellow to red, signalling a serious problem or imminent failure, one that led directly to the diminishment of conditional sentencing (2.3). The 2007 and 2012 legislated restrictions, most notably as established through Bill C-10, are framed as a foreseeable response to the unresolved challenges of conditional sentencing (see Appendix A for timeline of key events). Finally, this section concludes with a review of two recent studies that have assessed the conditional sentence in terms of its impact on Canada's imprisonment rate. Implications of their (disappointing) findings are considered in the context of the current research project.

2.1 The beginning: The emergence of the conditional sentence as a strategy for prison reduction

The initial (formative) years of conditional sentencing span the time between its introduction and the release of the Supreme Court of Canada's decision in *Proulx* (2000). Given the lack of guidance provided on the appropriate application of conditional sentencing, it is not surprising that the narrative of the sanction's early years reflects a considerable degree of uncertainty, as judges were left to find an appropriate niche for the new sanction on their own.¹⁵² In considering this period, the focus is on clarifying the sanction's initial goal(s) and identifying challenges as they relate to its primary purpose, that being the reduction in Canada of the recourse to imprisonment. Research

¹⁵² See, generally, Manson, *supra* note 149(b).

conducted at the time provides a critical window into utilization patterns, judicial thinking, and early public reactions. The following section incorporates this work into its exploration of the early challenges and formative years of conditional sentencing.

2.1.1 Bill C-41 and the creation of conditional sentences

When the Minister of Justice introduced Bill C-41 for second reading, he referred to it as part of the government's balanced approach to crime, making it clear that the legislation was intended to reduce the use of imprisonment, in part by promoting the use of community-based sanctions. Specifically, he explained that: "[t]his bill creates an environment which encourages community sanctions and the rehabilitation of offenders together with reparation to victims and promoting in criminals a sense of accountability for what they have done."¹⁵³ Speaking explicitly about conditional sentences the following year, the Minister framed the new sanction as one that would allow offenders to serve jail terms in the community under strict conditions and "[i]n a manner which is less costly to the state and more likely to result in a positive outcome."¹⁵⁴ Indeed, a 1996 news release from the Department of Justice engaged all three elements of the reform trifecta (cost, effectiveness, and humaneness):

[Conditional sentences] mean that lower-risk offenders who otherwise would be in jail may, under tight controls, serve their sentences in the community. This promotes protection of the public by seeking to separate more serious offenders from the community while providing less-serious offenders with effective, community-based alternatives. It will mean that scarce funds can be used for incarcerating and treating more-serious offenders. ... These amendments will bring greater consistency and fairness to the sentencing process.¹⁵⁵

¹⁵³ Canada, Parliament, House of Commons, September 20, 1994: Allan Rock (Minister of Justice and Attorney General of Canada) at 5873. The legislation was framed as the "product of over 14 years of effort to achieve comprehensive reform in the sentencing process," and its provisions were tied directly to the recommendations made by the CSC and *Daubney Report* (at 5870).

¹⁵⁴ Canada, Parliament, House of Commons, June 15, 1995: Allan Rock (Minister of Justice and Attorney General of Canada) at 1520. It is not clear whether the reference to "positive outcomes" referred to the anticipated effect of non-custodial programming (rehabilitation) or to the mere absence of the negative effects associated with incarceration. Given the acknowledgement in official documents that custodial sanctions were not reliably effective in crime reduction, it is likely the latter.

¹⁵⁵ Department of Justice. (1996). News release: Chapter 22 of the Statutes of Canada (formerly Bill C-41). Government of Canada, at p. 5.

What was unmistakably clear was that the new sanction was intended to replace prison terms of less than two years, meaning that the target was provincial prison populations (not those in federal institutions). In fact, given that most of the provisions of Bill C-41 had provincial or territorial impacts, the legislation can be seen as the federal government's response to increasing provincial concerns regarding correctional populations that threatened (in the mid-1990s) to outstrip institutional capacity. The *Corrections Population Reports* produced between 1997 and 2000, in fact, can be read as documentation of the extent to which the federal government responded to their concerns. Indeed, the final progress report (2000) adopted a somewhat political "mission accomplished" tone,¹⁵⁶ stating that "[t]hese figures are encouraging as we attempt to reduce our reliance on incarceration and promote diversion, restorative approaches, and community-based alternatives."¹⁵⁷

Notwithstanding the initial (positive) spin placed on Bill C-41 in terms of its potential to achieve meaningful prison reduction, many remained skeptical. For example, some critics argued that instead of offering a coherent and principled approach to sentencing, Bill C-41 normalized policymaking by "ad hoc-ery."¹⁵⁸ In addition, the legislation reflected multiple, sometimes inconsistent, policy positions, drawing upon the rhetoric of restraint and prison reduction,¹⁵⁹ while at the same time incorporating

¹⁵⁶ The final report notes that Canada's incarceration rate dropped by 4.7% between 1997 and 2000, though the reduction was not attributed to any specific change. See Public Safety Canada, *supra* note 130 at p. 1. Webster & Doob note that incarceration rates peaked in 1994 and began declining steadily, at least until the beginning of the 21st century. See Webster & Doob, *supra* note 1 at p. 169. On this point, see also Statistics Canada. (1999). *Adult correctional services in Canada, 1997-98*, by M. Reed & J. V. Roberts, in Juristat: 19:4, No. 85-002-XIE. (Ottawa: Statistics Canada), at p. 4.

¹⁵⁷ The incarceration rate cited went from 129 per 100,000 total population in 1997 to 123 per 100,000 in 2000 (a 4.7% reduction). Public Safety Canada, *ibid* at p.1.

¹⁵⁸ Brodeur suggests that instead of an integrated approach to sentencing that is consistent and principled, Canadian law since 1987 "has been enacted strictly on an ad hoc basis, as it always has been." Brodeur, J.P. (1999). Sentencing reform: Ten years after the Canadian Sentencing Commission. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (pp. 332–348). Toronto: University of Toronto Press, at pp. 343-344.

¹⁵⁹ Jull, Kenneth. (1999). "Reserving rooms in jail: A principled approach." *Criminal Law Quarterly*, 42(1), pp. 73-76.

language that reflected tenets of both retributive justice,¹⁶⁰ and restorative justice.¹⁶¹ In retrospect, Bill C-41 operated somewhat as a Rorschach test on sentencing policy, in that it allowed people to see what they wanted to see.¹⁶²

An additional concern related to what the legislation did not include. Despite repeated (and arguably disingenuous) efforts to link the new sentencing provisions to the recommendations contained in the Report of the Canadian Sentencing Commission and the *Daubney Report*, the government had “cherry-picked” from these publications. Most notably, it ignored elements thought to be critical to achieving a principled reduction in the use of imprisonment—the introduction of sentencing guidelines and the creation of an independent sentencing commission. In hindsight, the legacy of Bill C-41 may be that it was, in fact, more timid than adventurous,¹⁶³ representing an effort to establish some form of limited control over sentencing policy without making the hard (and often unpopular) decisions necessary to provide clarity and direction to sentencing judges.¹⁶⁴

¹⁶⁰ Roberts, J. V. & von Hirsch, A. (1999). Legislating the purpose and principles of sentencing. In J. V. Roberts, & D. P. Cole (Eds.), *Making sense of sentencing* (pp. 48-62). Toronto: University of Toronto Press, at p.53.

¹⁶¹ See, for instance, Roach, K. (2000). Changing punishment at the turn of the century: Restorative justice on the rise. *Canadian Journal of Criminology*, July, 249-280; and Stephens, M. (2007). Lessons from the front lines in Canada’s restorative justice experiment: The experience of sentencing judges. *Queen’s Law Journal*, 33(1), 19.

¹⁶² Progressives and abolitionists saw restraint, adult diversion, and a new non-custodial sanction; retributivists saw the fundamental principle of proportionality and references to “just sanctions”; utilitarians saw the familiar sentencing objectives of rehabilitation, deterrence, and incapacitation; and restorative justice proponents saw explicit recognition of reparations, notions of harm and community, and offender accountability. Some might be tempted to suggest—ironically—that there was something for everyone—unless, of course, you were a judge looking for clear guidance on how, when, and in what circumstances, the new conditional sentence should be used.

¹⁶³ This is in response to the question posed in 1999 by two of the drafters of Bill C-41: “Whether (Bill C-41) is too adventurous or too timid is an issue that will be grist for the mill of the next generation of sentencing reformers.” Daubney, D., & Parry, G. (1999). An Overview of Bill C-41 (The Sentencing Reform Act). In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (pp. 31-47). University of Toronto Press, at p. 45.

¹⁶⁴ One of the three objectives of Bill C-41 was “to implement a system of sentencing policy and process approved by Parliament.” Daubney & Parry, *ibid* at p. 33; see also Doob, A. N. (1999). Sentencing reform: Where are we now? In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (pp. 349-363). University of Toronto Press, at p. 362 – “The first task is to decide whose challenge sentencing is. We have accomplished that in Canada: Parliament has accepted the challenge. It will be interesting to see how, having taken the first step, Parliament will decide to move.”

Importantly in terms of its attempts to reduce Canada's reliance on incarceration, this legislation did not restrict the use of imprisonment for any offences, nor did it provide guidance to judges in terms of which (of the smorgasbord of) sentencing objectives should apply in which cases. Instead, a decision was made to place faith in judicial discretion and the capacity of appellate courts to supervise and provide direction.¹⁶⁵ As Doob (2011) observed, by avoiding the difficult decisions about the purpose and principles that should guide sentencing, the door was left open for "unprincipled changes to occur when the political times were right."¹⁶⁶

Conditional sentence orders – s. 742.1

Nowhere are the limitations of Bill C-41 clearer than in the creation of conditional sentences, a new sanction that quickly became the "symbolic focal point of the new legislation."¹⁶⁷ Conditional sentences allow judges to order that certain terms of imprisonment be served in the community. That is, after determining that a jail sentence is the most appropriate sanction, a judge can go on to decide whether that term should be served in a traditional institution, or in the community under prescribed conditions. As originally enacted, there were few restrictions on their use and judges enjoyed considerable discretion in their application. Their creation, statutorily, is found in section 742.1 of the amended *Code* (original text):

Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

¹⁶⁵ Daubney & Parry, *ibid* at p. 45.

¹⁶⁶ Doob, A. N. (2011). The Unfinished Work of the Canadian Sentencing Commission. *Canadian Journal of Criminology and Criminal Justice*, 53(3), 279–297, at p. 287.

¹⁶⁷ Jull, *supra* note 159 at p. 68.

A key difference between this sanction and earlier attempts to offer non-custodial options was in the sanction's construction not as an alternative to jail but, rather, as an *alternate form of jail*—imprisonment without incarceration (see Appendix B for full text, including amendments made 1996-2015).¹⁶⁸

2.1.2 False starts: Yellow lights on the dashboard

Conditional sentences were controversial from the start, raising conceptual and operational issues in terms of their form and function. Given that these challenges represented very real threats to the sanction's effectiveness as a tool for prison reduction, the following section includes a brief description of each. These theoretical and practical concerns are important for two reasons. First, it is likely that some or all of these (completely foreseeable) early challenges are responsible for conditional sentencing's "rocky" start and, quite possibly, later diminishment. Second, these

¹⁶⁸ Earlier efforts to reduce the use of imprisonment through the introduction of sentencing "alternatives" have used the term more literally—i.e., a sanction that can be chosen *instead of* imprisonment. For example, a report conducted for the CSC on this issue identified several programs that have been historically regarded as alternatives to imprisonment, including fines, and a variety of requirements that could be imposed as conditions of a probation order (e.g., community work service, restitution, and/or attendance programs offering counselling or skills training). See Jackson, M. (1988). *A profile of Canadian alternative sentencing programmes: A national review of policy issues* (p. 252) [Report prepared for the CSC]. Minister of Justice and Attorney General of Canada, at p. 4.

It is also worth noting that there were two earlier (prior to Bill C-41) proposals that sought to create a new sanction called a conditional sentence. In both cases the conditional sentence acted as a replacement for the existing suspended sentence and could be characterized as a sanction imposed as an alternative to imprisonment. The term first appeared in Bill C-19, legislation introduced by Pierre Trudeau's Liberal party, which died on the order paper when Parliament was dissolved in 1984. That conditional sentence involved suspending sentence for a term, with the only requirement being that the offender not be found guilty of an offence during the period of suspension. If the offender completed the term without further offences, the order would be considered successfully completed; if not, the offender would be returned to court and the sentence originally suspended could be imposed. See Bill C-19. First reading February 7, 1984 in the 2nd session, 32nd Parliament; see also Government of Canada, *supra* note 48 at pp. 45-46.

A second attempt to create a conditional sentence can be seen in the 1991 DOJ proposals regarding intermediate sanctions, one of which included a conditional sentence as an alternative to the suspended sentence. In this incarnation the court would specify the sentence, but its execution would be suspended for the term of the order, during which time the offender would be bound to comply with reasonable conditions. In the event of a new offence or a failure to comply was alleged, the offender would be returned to court. The breach hearing would involve a reduced evidentiary burden (less than proof beyond a reasonable doubt) and would not require conviction on a new offence. If a breach was proven, the court would be required to impose the sentence originally specified but until then suspended. See Department of Justice, Sentencing Team, Policy Programs and Research Sector. (1991). *Intermediate Sanctions "Consultation letter."*

challenges provide necessary context for any discussion of the sanction's success, or lack thereof. Notably, this includes understanding the remedial actions proposed to salvage conditional sentences, which were largely ignored.

2.1.2.1 Theoretical/conceptual [birth] defects and growing pains

Penal paradox

The “original sin” of conditional sentencing may be in its construction as an alternate form of imprisonment.¹⁶⁹ By most lay-persons’ reading, this is an obvious contradiction in terms—a *jail* sentence served in the *community* or, put more simply, a sentence of imprisonment that does not involve incarceration. In sentencing an offender to a conditional sentence, a judge must initially consider the purposes and principles of sentencing, including the principle of restraint and the admonition to consider all available sanctions other than imprisonment. Subsequently, he/she must decide that imprisonment is necessary; that is, that no less restrictive sanction would be appropriate. It is only after reaching this point that the judge can consider whether the prison sentence can be served in the community under a conditional sentence order. Said differently, the judge must decide that imprisonment is necessary, but incarceration is not. While accurately described by Gemmell as a “penological paradox”,¹⁷⁰ this ‘fiction’ must be accepted if the conditional sentence is going to reduce prison populations.

Early reactions to conditional sentencing focused on the challenges posed by its statutory construction. At best, the sanction did not make sense; at worst, it appeared to be dishonest, defying common sense and violating notions of truth in sentencing.¹⁷¹ Notwithstanding later efforts to promote conditional sentences as a form of “community imprisonment,” the legitimacy of the sanction was clearly undermined in the eyes of the

¹⁶⁹ Webster & Doob refer to the name—conditional sentence of imprisonment—as “almost certainly a serious mistake” (*supra* note 1 at p. 171). Reid & Roberts agree that the name is problematic in terms of public acceptance, suggesting, instead, a “re-branding” to something that more literally reflects the nature of the sanction—e.g., “house arrest” or “community confinement” (*supra* note 1 at p. 36).

¹⁷⁰ Gemmell, *supra* note 149(a) at p. 336.

¹⁷¹ In his consideration of the purposes of sentencing, Doob suggests two basic premises: 1) they must make sense; and 2) they must be honest. To the extent that these requirements could be argued to apply equally to individual sanctions, conditional sentences fail both tests – see Doob, A. N. (2016). *A values and evidence approach to sentencing purposes and principles*. Research and Statistics Division; Department of Justice Canada, at p. 10.

public.¹⁷² It should have surprised no one that there was public pushback, or that many saw conditional sentences as yet another example of the system either coddling offenders or putting the offender's interests above those of the victim or community.¹⁷³ More importantly in terms of application, the apparent paradox impacted judicial confidence in the sanction and created confusion for at least some judges.¹⁷⁴

Distinguishing between conditional sentences and suspended sentences

Prior to the introduction of the conditional sentence, judges had the option of suspending the passage of sentence and placing an offender on probation for a fixed period of time, with conditions.¹⁷⁵ Suspending sentence gave judges a non-custodial option that allowed for the supervision of offenders in the community for up to three years, and judges had considerable latitude when crafting probation orders.¹⁷⁶ Notably, aside from limited mandatory conditions,¹⁷⁷ the *Code* explicitly contemplates the inclusion of potentially onerous probation conditions, including the performance of community service, the payment of restitution, and (with an offender's agreement) active participation in a treatment program.¹⁷⁸ In terms of enforcement mechanisms, offenders

¹⁷² See, for instance, Roberts, J. V. (2004). *The virtual prison: Community custody and the evolution of imprisonment*. Cambridge: Cambridge University Press, at pp. 132-33.

¹⁷³ *Ibid* at pp. 132-33.

¹⁷⁴ See, for instance, Roberts, et al., *supra* note 13.

¹⁷⁵ Section 731(1)(a) allows the court to suspend the passing of sentence (if no minimum punishment is prescribed) and direct the offender be released on the conditions set out in a probation order.

¹⁷⁶ Sentencing judges could also attach probation to a term of provincial imprisonment (i.e., for a term under two years), which some saw as useful given the limited use of provincial parole. See Manson, A., Healy, P., Trotter, G., Roberts, J. V., & Ives, D. (2016). *Sentencing and penal policy in Canada: Cases, materials, and commentary* (Third). Emond Montgomery Publications (Ch. 9 Probation).

¹⁷⁷ Section 732.1(2) requires that all probation orders include requirements that the offender: keep the peace and be of good behaviour, appear before court when required, and notify the court (or probation officer) of any changes to their address or employment.

¹⁷⁸ See s.732.1(3) for the optional conditions of a probation order. In addition to the itemized list, s. 732.3(h) provides for the imposition of "such other reasonable conditions as the court considers desirable...for protecting society and for facilitating the offender's successful reintegration into the community."

convicted of new charges (including a breach of probation) can be brought back to court for sentencing on the original charge.¹⁷⁹

One might be forgiven for asking why—if we already had a sentencing option that involved an offender’s supervision in the community—we needed another. The answer may lie in the enforcement challenges related to the suspended sentence. As noted above, in cases involving a new offence the sentence originally suspended could still be passed. In theory this makes the threat of imprisonment appear very real; in practice though, the threat of revocation (of the suspension) appears to be an empty one. Once a sentence is suspended it is rarely passed, a fact that Gemmell suggests made suspended sentences “toothless remedies.”¹⁸⁰

Notably, the enforcement challenges of suspended sentences were an issue addressed before the Daubney Committee.¹⁸¹ Probation officers made a number of recommendations to the committee in an effort to improve enforceability, including: the elimination of the offence of breach of probation; the implementation of a breach “hearing” procedure with less stringent requirements (e.g., satisfactory proof of a breach, not proof beyond a reasonable doubt); and the “tolling” of probation orders so that they would not continue running once a breach has been alleged.¹⁸² While not acted upon at the time, it could be argued that the enforcement “fixes” suggested above did find their way into legislation, not as improvements to the suspended sentence scheme but, rather, as the breach mechanisms designed for the conditional sentence (of imprisonment).

In contrast to suspended sentences, conditional sentences involve the service of the sentence (not its suspension). Drafted to act as an alternate form of imprisonment,

¹⁷⁹ When an offender who is bound by a probation order made under s. 731(1)(a) (the suspended sentence provisions) is convicted of a new offence, including a breach of that probation order, in addition to any other penalty they may be facing, the court can revoke the suspended sentence and “impose any sentence that could have been imposed if the passing of sentence had not been suspended” (s. 732.2(5)).

¹⁸⁰ Gemmell, J. (1999). Conditional sentences. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (pp. 63–76). University of Toronto Press, at p.69.

¹⁸¹ See *Daubney Report*, *supra* note 51 at pp. 102-104. Aasen relied upon his own research on this issue, estimating the revocation rate on suspended sentences to be “a small fraction of one percent.” See Aasen, J. (1985). *Enforcement of probation in British Columbia* (unpublished MA Thesis). Simon Fraser University, at p. 364.

¹⁸² Aasen, *ibid* at pp. 397-398.

the challenge, at the start, was twofold. On the one hand, a conditional sentence looked nothing like what most people would commonly understand to be a prison sentence—i.e., there was no requirement that an offender be confined to any location. On the other hand, a conditional sentence could look a lot like a “new and improved” suspended sentence with probation. In short, one was not *necessarily* more onerous than the other. In terms of the impact on an offender’s liberty or day-to-day life, both orders are effectively defined by the conditions imposed and the consequence of breaches, two areas in which judges enjoy considerable discretion.¹⁸³ Indeed, early research that compared the conditions imposed on conditional sentences to those imposed on probation orders suggested that patterns of optional conditions were not dissimilar between the two orders.¹⁸⁴

In La Prairie’s (1999) report on the first three years of conditional sentencing, seven jurisdictions provided information about the optional conditions attached to the orders. The most frequently imposed conditions were treatment (27.8%), community work service (11.3%) and a curfew (11.4%). House arrest accounted for only 4.9% of the 12,041 optional conditions reviewed.¹⁸⁵ The average number of optional conditions imposed per order in five jurisdictions was 1.6.¹⁸⁶

Early confusion between suspended sentences and conditional sentences was problematic, especially to the extent that it resulted in prosecutors or judges viewing conditional sentences as a form of robust probation. Certainly, if conditional sentences

¹⁸³ The conditional sentencing provisions provided little direction to judges regarding appropriate conditions, and the breach mechanism, though facilitated, provided non-custodial options even upon proven breach. In an early article, Roberts (1997) suggests that the threatened consequences of a conditional sentence breach are “no more certain or severe than [a breach of] a probation order.” Roberts, *supra* note 150 at p. 186.

¹⁸⁴ Roberts, J. V., Antonowicz, D., & Sanders, T. (2000). *Conditional sentences of imprisonment: An empirical analysis of optional conditions* (p. 14). Department of Justice Canada. In this study the researchers reviewed the conditions imposed on 700 conditional sentences and 700 suspended sentences imposed in Ontario (1997-1998).

¹⁸⁵ La Prairie, C. (1999). *Conditional sentence orders by province and territory—Final Report (September 6, 1996—September 30, 1999)*. Department of Justice Canada, at Table VIII. Based on information obtained from seven jurisdictions. Percentages reflect the use of that condition as a percentage of all optional conditions imposed (not as a percentage of orders). While limitations in either the coding scheme used or the presentation of the data resulted in many conditions (33.2%) being coded as “other”, the information that was provided is interesting, nonetheless.

¹⁸⁶ *Ibid* at p. 6. This includes Newfoundland, New Brunswick, PEI, Saskatchewan and NWT. Optional conditions exclude the mandatory conditions as set out in section 742.1.

were to result in a meaningful reduction in the use of imprisonment, it was imperative that they be used in place of what would otherwise have been jail, not probation.

The 1998 National Survey (of judges) approached this issue in several ways. First, judges were asked whether a conditional sentence could be as effective as a prison term in achieving various sentencing objectives.¹⁸⁷ While most (71.7%) judges believed conditional sentences could usually or always be as effective as imprisonment in achieving rehabilitation, the numbers were reversed when it came to denunciation (35.3%) and deterrence (34.7%). More importantly, given the critical role that these objectives would later take (e.g., in *Proulx*), one-quarter (24.4%) of judges were of the opinion that a conditional sentence would almost never or never be as effective as a term of traditional imprisonment in achieving deterrence; almost one-third (31.7%) took the same position when it came to denunciation.¹⁸⁸

It is possible (if not likely) that the lack of confidence expressed in the ability of a conditional sentence to satisfy the objectives of deterrence and denunciation is related to its resemblance to a suspended sentence with probation. To get at this issue, the survey asked judges whether they thought a conditional sentence had a different impact on an offender than a probation order with the same conditions. Again, to succeed as a prison alternative, a conditional sentence should be clearly distinguishable from a probation order. Notably, only one judge in five (21%) indicated that a conditional sentence would definitely have a different impact on an offender; approximately one-third (34%) of the responding judges believed that a conditional sentence definitely or probably would not have a different impact on an offender than a probation order.¹⁸⁹

Net-widening

The difficulties in terms of distinguishing between conditional and suspended sentences elevated concerns around net-widening from mere speculation to what was, in effect, a practical certainty. Net-widening is a phenomenon that occurs most often when a sanction introduced in lieu of another which is *more severe* is, instead, used in

¹⁸⁷ It is notable that the question implies that a term of imprisonment can be (or is) effective in achieving each of the sentencing objectives.

¹⁸⁸ Roberts, et al., *supra* note 185 at p. 6 (Table 2.5).

¹⁸⁹ *Ibid* at p. 7 (Table 2.6).

lieu of an existing sanction which is *less severe*. The net-widening tendencies of sanctions introduced as prison alternatives were well documented by the mid-1990s, having been a focus of the CSC, the *Daubney Report*, and the DOJ consultation papers.¹⁹⁰ Indeed, net-widening is generally recognized as a common cause for failure in prison reduction strategies that rely upon the introduction of non-custodial alternatives. Notably, a cautionary tale was provided by the introduction of the suspended sentence in Britain.¹⁹¹ The British suspended sentence failed, at least in part due to estimates that less than half (40% to 50%) of those whose sentence was suspended were otherwise facing sentences of imprisonment. In terms of the British experience, Bottoms (1981) argued that it was the judges' inappropriate use of the suspended sentence that defeated the purpose behind the legislation. He offered the following explanation:

It is, quite simply, that while the official legislative intention of the 1967 Act was based on the 'avoiding prison theory', many judges and magistrates, on the contrary, were inclined to have a strong commitment to the suspended sentence on the alternative 'special deterrent theory', which as we have seen actually *invited* them to use the suspended sentence in place of some cases of fines and probation.¹⁹²

And so, in the absence of a sentencing commission or sentencing guidelines, the first challenge for conditional sentencing was convincing judges to use the sanction as a term of imprisonment; the second was to prevent them from using it as a form of robust probation (i.e., as a "special deterrent"). Put another way, Parliament created a non-custodial sanction that looked like enforceable probation but told judges that they could only use it in place of jail. The likelihood of surmounting these challenges and, by extension, achieving a reduction in the use of imprisonment, would likely require more than a simple legislative change. As Gemmell (1997) observed, it would not be easy to shift the judiciary away from its historical reliance on prison sentences. That concern, in conjunction with the British experience with its suspended sentence, led him to conclude

¹⁹⁰ See CSC, *supra* note 38 at p. 367 and the *Daubney Report*, *supra* note 51 at p. 76. See also McMahon, M. (1990). "Net-widening": Vagaries in the use of a concept. *British Journal of Criminology*, 30(2), 121–149; and Morris, N., & Tonry, M. (1990). *Intermediate sanctions: Between prison and probation*. Oxford University Press, at p. 47.

¹⁹¹ The English sanction involved suspending the execution of any jail sentence of up to and including two years, for a period between one and three years. The sentence was to be activated in full upon conviction of an offence punishable by imprisonment during the operational period. See Bottoms, A.E. (1981) The suspended sentence in England, 1967 - 1978. *British Journal of Criminology*, 21(1) at p.2.

¹⁹² *Ibid* at p.9.

that conditional sentences were a “very risky solution” to the problem of over-incarceration in Canada.¹⁹³

In an effort to avoid net-widening, the legislation required that a judge first decide to impose a term of imprisonment (of less than two years).¹⁹⁴ Theoretically, it was only at this point that a judge could consider a conditional sentence. In practice, it would appear that this obstacle to net-widening was more illusion than real. Indeed, early empirical studies would seem to support a net-widening effect whereby an increase in the use of conditional sentences did not, in fact, result in an equivalent reduction in the use of imprisonment.

As a case in point, correctional admissions data were collected every six months over a two-year period beginning April 1, 1996, in five provinces and one territory in an effort to monitor the impact of conditional sentences on sentenced admissions to prison. It was expected that, if conditional sentences were being used in place of custodial sentences, there would be a negative relationship between the number of conditional sentences imposed and sentenced admissions. Analysis of the data, however, showed that this was not the case. The number of offenders given conditional sentences was considerably higher than the relatively slight decreases noted in custodial admissions. From April 1996 to April 1998, for instance, 12,531 offenders were placed on conditional sentences; during the same period sentenced admissions to custody decreased by only 1,337 (see Table 2-1).

¹⁹³ Gemmell, *supra* note 170 at p. 334.

¹⁹⁴ Section 742.1 requires “that the court first impose a sentence of imprisonment of less than two years” before considering whether to make the sentence conditional. This two-step methodology was later confirmed by the Supreme Court of Canada in *Proulx*. The Court instructs that judges should first reject both a penitentiary term and probation. “Having determined that the appropriate range of sentence is a term of imprisonment of less than two years, the judge should then consider whether it is appropriate for the offender to serve his or her sentence in the community.” *Proulx*, *supra* note 14 at para 127.

Table 2-1 Impact of CSOs on sentenced admissions to custody (1996 to 1998)

	# conditional sentences imposed	Impact on sentenced admissions
BC	3,000	-184
Alberta	2,091	-636
Saskatchewan	1,200	+32
Manitoba	440	-239
Ontario	5,800	-310
Total	12,531	-1,337

In addition, trends observed in other data suggest similar patterns. For instance, in the year prior to the introduction of conditional sentences, 35% of provincial court sentences consisted of a term of custody. Two years later, by which time over 22,000 conditional sentences had been imposed, the proportion of sentences involving actual imprisonment remained at 35%.¹⁹⁵ It is difficult to reconcile these findings with the results of the 1998 National Survey that explored judicial perspectives on conditional sentencing. In response to a question regarding the effect the sanction had on provincial admissions to custody, most judges (75%) indicated that they believed conditional sentences had reduced the number of offenders sent into custody in their court.¹⁹⁶

Finally, early research conducted in Quebec also substantiates a net-widening effect. Data from this study suggested that the offences attracting conditional sentences were more like those that historically resulted in probation rather than imprisonment. Specifically, it warned that:

[t]he type of offence recorded [which resulted in a conditional sentence] is more similar to the type that commonly occurs on probation ...it may therefore be suggested that if conditional sentencing had not been available, a good number of persons on whom it was imposed would have received a probation sentence.¹⁹⁷

¹⁹⁵ Roberts, J. V. (1999). Recent correctional trends: Good and bad news. *Justice Report*, 14(2), at p.10; Reed & Roberts, *supra* note 156 at p. 9.

¹⁹⁶ Roberts, et al., *supra* note 13 at p. 16. "Definitely yes" 38.7%; "probably yes" 36.4%.

¹⁹⁷ Roberts, J. V. "The hunt for the paper tiger: Conditional sentencing after Brady." (1999), 42(May) C.L.Q., at p.61 - quoting C. d'Auteil, *Implementation of Conditional Sentencing in Quebec* (Quebec Correctional Services Headquarters, 1998), at p.3.

Despite an awareness of the net-widening issue, the sanction was likely being imposed (at least in part) in place of less onerous options, not in place of prison.¹⁹⁸

Taken together, the early research suggests that conditional sentences got off to a rocky start as a mechanism for prison reduction. While judges were clearly willing to experiment with this new sentencing option, it would appear that it was often employed incorrectly, undermining its primary goal. Most obviously, its substitution for a suspended sentence rather than for a prison sentence would make no contribution to the reduction of the use of imprisonment. Less obviously, this tendency toward net-widening could—ironically—increase the very metric that it was intended to reduce. This unintended net-widening effect may result through two distinct mechanisms.

In the short-term, it could occur when an offender who otherwise would not have been sentenced to imprisonment was placed on a conditional sentence, and then taken into custody upon breaching that order.¹⁹⁹ Long-term impacts are related, though more nuanced, involving the gradual “up-tariffing” of sentences in order to bring conditional sentences into the range of available options for a specific case. The most likely scenario in which this could occur is when judges—who want to impose a conditional sentence for an offence that would generally only merit a community sanction—begin to conceptualize the crime as actually deserving of a provincial prison term. In this case, they can “justifiably” impose a conditional sentence in its place. As a result, the sentence range for that offence may be unintentionally shifted upwards (towards the more punitive). While this practice may not represent an immediate threat to prison reduction

¹⁹⁸ This is consistent with the findings of an early research project conducted in the Toronto courts where judges indicated that they liked conditional sentences because “it gave them another sentencing option.” The fact that this factor seemed to take precedence over having an option to replace custody, the authors suggested, reflected a general lack of clarity regarding sentencing needs and the primary objective of conditional sentences.

La Prairie, C. and Koegl, C. (1998). “Conditional Sentences: Exploratory Research into Opinions and Perceptions of Judges in Select Urban Courts.” Research Report. (Ottawa: Department of Justice), at p. 3.

¹⁹⁹ Section 742.6 (9). It could be argued that two additional precautions were taken to ensure that, even if the sanction were to be used inappropriately (i.e., in place of a less severe sanction), it would not act to increase prison populations. First, since an offender serving a conditional sentence is given credit for time served in the community, in the event of a breach, the most an offender can be ordered to serve is the remainder of the sentence. Second, judges are given several options in terms of responding to breaches. They can take no action, change optional conditions, or have the offender serve all or part of the remaining sentence in custody.

(if the orders are not breached), “up-tariffing” concerns can arise in the event that the use of conditional sentences is restricted at a later date (foreshadowing things to come).

2.1.2.2 Practical/operational challenges

Implementation and education

In addition to the theoretical and conceptual obstacles identified above, practical or operational challenges (that threatened the sanction’s ability to achieve prison reduction goals) also emerged in the early years. Indeed, even in terms of the logistics of implementation, it became almost immediately apparent that the conditional sentencing provisions were not well thought out.²⁰⁰ A notable example is the failure to include a statutory provision to stop the “running of the clock” on a conditional sentence when a breach was alleged. In the absence of this common-sense safeguard, orders could be completed before the offender was brought back before the court, in which case judges had no ability to impose any consequence for non-compliance.²⁰¹

Upon implementation, there was also considerable confusion in terms of which offences the conditional sentence was intended for, again reflecting a lack of thoughtfulness on the part of government. Indeed, there was nothing in the original legislation to restrict its application to all offences that met the minimal requirements. The notion that conditional sentences were never meant for serious or violent offences is indicated, not by the legislation, but by comments made in the House of Commons²⁰²

²⁰⁰ A likely culprit for this lack of careful consideration resides in the fact that much of the debate around Bill C-41 focused on the controversial proposal to add sexual orientation as an aggravating circumstance in hate crimes (s.718.2 (a)(i)). Little to no time was spent debating the creation of conditional sentences or the directive that sentencing judges consider sanctions other than imprisonment for all offenders, “with particular attention to the circumstances of Aboriginal offenders” (s. 718.2(e)). Reflecting back decades later, the Minister of Justice responsible for Bill C-41 spoke of his surprise at the focus on “sexual orientation” and the lack of debate or discussion around the package as a whole:

Those boneheads didn’t spend a moment talking about the policy of conditional sentences, didn’t talk even about the...provisions for recognizing the [special] circumstances of Aboriginal [people in sentencing] which I thought was daring at the time. I expected to have the roof fall in on me over that. They focused on those two words. Doob & Webster, *supra* note 80(c) at p. 373.

²⁰¹ See Webster & Doob, *supra* note 1 at p. 170. See also Appendix B for amendments made to the conditional sentencing provisions (s. 742.1).

²⁰² Canada, Parliament, House of Commons, September 20, 1994: Allan Rock (Minister of Justice and Attorney General of Canada) at 5873:

and government communication, both of which repeatedly assured the public that the sanction would be targeted only at “less serious and first time offenders who would otherwise be in jail.”²⁰³ A senior Justice official addressed both the lack of planning and the scope of application issues, framing the inclusion of the conditional sentence of imprisonment as a drafting “afterthought” that was added “in an effort to bolster the alternatives to incarceration available to sentencing judges for non-violent property related offences.”²⁰⁴

The lack of clarity regarding the goal(s) of conditional sentencing was reflected in the judicial responses to the 1998 National Survey. After all, more than a year into the new sentencing regime, one might expect that judges at least had a shared understanding of the sanction’s primary objective. When asked about this, however, just over half of the judges surveyed (56.4%) identified reducing imprisonment (or providing a more cost-effective alternative to prison) as the sanction’s primary objective.²⁰⁵ Promoting offender rehabilitation, reintegration, employment, etc. was identified by over one-quarter (27.3%) of judges and providing another intermediate sanction by 10.7% (the remaining 5.7% were coded as “other”).

That there was not a clear consensus on the primary goal of the conditional sentence is troubling for several reasons. First it suggests either an ambivalence in the legislation (i.e., no clear goal established), or a lack of communication around the sanction’s principal objective. Either way it allows (or invites) judges to adopt differing interpretations based on their own opinions regarding what is needed. Second, any effort to assess or measure a sanction’s effectiveness presupposes that we have a shared understanding of its primary goal. This is particularly important when (possibly

It seems to me that such an approach [referring to conditional sentence orders] would promote the protection of the public by seeking to separate the most serious offenders from the community while providing that less serious offenders can remain among other members of society with effective community-based alternatives while still adhering to appropriate conditions.

²⁰³ A DOJ ‘News Release’ on Bill C-41 highlighted provisions that would: “give the courts more options to distinguish between *violent, serious crimes* that require jail and *less-serious crimes* that can be dealt with more effectively in the community;” and “add a new type of sentence to the Criminal Code, called a ‘conditional sentence,’ that will allow more offenders guilty of less-serious crimes to serve their sentences in the community under greater control.” Department of Justice, *supra* note 155 at p.1.

²⁰⁴ Mosley, R. (2014). Canadian sentencing policy - A look back. Paper presented at *ISRCCL Conference, June 2014*, Vancouver, BC. 1-20, at p. 15.

²⁰⁵ Roberts, et al., *supra* note 13 at p. 5 (Table 2.3).

conflicting) secondary goals develop and gain value. Finally, the lack of consensus in this critical area appears to have extended to the way in which conditional sentences were implemented.

Implementation challenges surrounding conditional sentences were not restricted to their intended use by the judiciary. Rather, they extend as well to the public. Specifically, the conditional sentence was introduced without any type of sustained public education campaign. As noted, there is empirical support for the notion that an informed public may be more accepting of community sanctions, including for less serious cases of violence.²⁰⁶ Notably though, and as McLellan (2011) observes, there was no apparent effort made by the government to explain the new sanction or to seek support for its usage.²⁰⁷ This, despite the recognition that the public would not easily understand (or accept) the notion of imprisonment without incarceration.

When this issue was canvassed through the 1998 National Survey, responses suggested that most judges believed that the public did not, in fact, understand the new disposition.²⁰⁸ When asked whether the public could be made to understand the difference between a conditional sentence and a probation order, most judges expressed the belief that they could (63.4%).²⁰⁹ Whether the public understands conditional sentences, and can distinguish them from probation, is important given that 79.6% of the judges surveyed reported taking the impact a conditional sentence might have on public opinion into account when passing sentence.²¹⁰ When introducing the

²⁰⁶ Research suggests that the more the public knows about specific issues or sentence results, the more positive their attitudes regarding the outcome. See, generally, Doob, A. N. (2000). Transforming the punishment environment: Understanding public views of what should be accomplished at sentencing. *Canadian Journal of Criminology*, 42(3), 323-340; Roberts, J. V., Crutcher, N., & Verbrugge, P. (2007). Public attitudes to sentencing in Canada: Exploring recent findings. *Canadian Journal of Criminology & Criminal Justice*, 49(1), 75-107; Varma & Marinos, *supra* note 109.

²⁰⁷ McLellan, M. F. (2011). The prospective devitalization of conditional sentences. *Criminal Law Quarterly*, 57 (June), at p. 274. See also Webster & Doob, *supra* note 1 at pp. 172-73.

²⁰⁸ When asked whether they thought the general public understood the nature of conditional sentences, 78% responded either “no, none of the public” or “only a few of the public.” Roberts, et al., *supra* note 13 at p. 17 (Table 2.23).

²⁰⁹ The complexity and counter-intuitive nature of the sanction was reflected in the fact that more than one-third (36.6%) of the judges thought that the public could not be made to understand it. The response breakdown was as follows: “yes, all or most” (35.5%), “yes, some” (27.9%), and “only a few or none” (36.6%). *Ibid* at p. 18 (Table 2.25).

²¹⁰ Only 20.4% of the judges responded “no, never” on this question. *Ibid* at p. 20 (Table 2.28).

new sanction, however, the government opted to take the simpler path. Instead of persuading the public to embrace the spirit of what were arguably intended as transformative changes, press releases of the day focused on assuring the public that the sanction would be used only for less-serious and non-violent offences.²¹¹

And so, it should not have surprised anyone to find that the public did not understand, broadly, the changes introduced by Bill C-41, or more specifically, the nature of conditional sentences (including how they most certainly are not probation orders). This is reflected in the limited public opinion research that was conducted at the time regarding the introduction of conditional sentences, which was not encouraging. A survey conducted in 1999 suggested “widespread public ignorance” regarding the new sentencing option.²¹² Roberts and La Prairie (2000) summarized early public opinion polling as follows:

Canadians still do not have a clear idea of the nature of the new sanction. It is likely that some people confuse the conditional term of imprisonment with a sentence of probation or a period of supervision on parole.²¹³

This lack of clarity was troubling given the importance of public support for sentencing and early concerns about the construction of conditional sentences. The researchers noted that almost all of the information provided to the public about conditional sentencing came through the news media, and that media coverage of conditional sentencing had tended to focus on the sanction’s leniency, or its resemblance to a term of probation.²¹⁴

²¹¹ Aside from the fact that the legislation contained no such restrictions, the difficulty with these assurances was that they did not make sense. In the absence of lengthy criminal histories or breach convictions, such (less serious, non-violent) offenders would rarely be destined for jail. Conditional sentences can only be effective in prison reduction if they are imposed in cases that would otherwise have attracted jail terms, presumably for either chronic petty offenders who are poor candidates for community supervision, or for low-risk offenders convicted of serious offences. The former invites non-compliance and high breach rates while the latter can lead to public outcries of leniency, sentiments stoked by displeasure expressed by police, prosecutors, and victim advocates. See North, D. (2001). The “Catch 22” of conditional sentencing. *Criminal Law Quarterly*, 44(3), 342, at p. 353.

²¹² Sanders, T., & Roberts, J. V. (2000). Public attitudes toward conditional sentencing: Results of a national survey. *Canadian Journal of Behavioural Science*. 32(4), 199–207, at p. 199.

²¹³ Roberts, J. V., & La Prairie, C. (2000). *Conditional sentencing in Canada: An overview of research findings* (No. RR2000-6e; p. 45). Department of Justice Canada, at p. 31.

²¹⁴ *Ibid* at pp. 25-26.

Resourcing

When the federal government created a sanction that allowed offenders otherwise destined for jail to serve terms of imprisonment in the community, there was an assumption that this offender group would have enhanced risks and needs and that they would be subject to tight controls in the community.²¹⁵ However, the provincial governments are responsible for providing and funding such resources, and there were no guarantees that funds would be allocated for the support and supervision of these offenders. If anything, there was a stated expectation that no increased funding would be made available at either the federal or provincial levels of government.²¹⁶

Several scholarly and government publications have stressed the need to have well-run and adequately funded resources in place to support the use of community-based sanctions.²¹⁷ Insufficient resources for offender supervision and support can create additional challenges for non-custodial sanctions. A recent national survey suggests that public concerns about the use of community-based sanctions in Canada are often related to perceptions that adequate resources are not being provided to

²¹⁵ See comments of The Honourable Allan Rock when introducing Bill C-41 for second reading and speaking specifically about the (new) conditional sentence *Hansard 20 Sept 1994*, at p.5873. “This sanction is obviously aimed at offenders who would otherwise be in jail but who could be in the community *under tight controls*” (emphasis added).

²¹⁶ Certainly the 1990 government discussion papers were alive to the issue of costs. In *Directions for Reform: Sentencing*, the report identified concerns with program funding through provincial governments:

It is crucial to develop a series of measures that will serve both the interests of the provinces and those of the federal government in the area of intermediate sanctions. We cannot impose requirements on the provinces that will have as their result major program expenditure, without close consultation (*Directions for Reform*, supra note 67 at p. 20).

In 1991, the Department of Justice followed up on the *Directions for Reform* publications by circulating a series of proposals regarding intermediate sanctions. The consultation letter that accompanied the proposals made it clear that one of the most important policy issues facing the Department of Justice at the time was cost:

It must be said again, however, that the [sentencing] reforms must be effected in a way that increases efficiency, not cost. Most “players” in the area of Intermediate Sanctions have no expectation of increased funding. This applies equally at the federal and the provincial levels of government (*DOJ Consultation letter*, supra note 168 at p. 5).

²¹⁷ The CSC recommended that “...the federal and provincial governments provide the necessary resources and financial support to ensure that community programs are made available and to encourage their greater use” – CSC, supra note 38 at p. 561. The *Daubney Report* included similar wording in recommendation 38(a) – “That federal and provincial authorities develop, support and evaluate alternatives to incarceration and intermediate sanctions,” supra note 51 at p. 256. See also Doob, supra note 2.

monitor offenders in the community.²¹⁸ This can raise concerns around public safety as well as perceptions of leniency, both of which can reduce confidence and support for the sentencing process.

Notably, the requirement that community-based sanctions be tightly monitored and rigorously enforced is also relevant to judicial perceptions of their effectiveness, and, by extension, the likelihood that they will be used in place of traditional terms of imprisonment.²¹⁹ There is a sense that offenders are more likely to comply with conditions if the consequences for breaching the order are known, severe, and regularly imposed.²²⁰ In terms of drawing from the custodial population, judges are more likely to use community-based sanctions appropriately if they believe their orders will be monitored and enforced. For instance, in the 1998 National Survey, 80.2% of judges indicated that they would be inclined to use conditional sentences more frequently if there were more community and supervisory resources provided.²²¹ Concerns regarding levels of supervision were expressed by more than one-quarter (27.4%) of the judges, with less than half (40%) indicating that conditional sentences were adequately supervised (some, most, or all of the time) in their area.²²² As was the case with resources generally, judges who believed conditional sentences were adequately supervised were more likely to impose a conditional sentence.²²³

La Prairie (1999) identified two areas thought to be crucial in determining the future success (or failure) of conditional sentences. The first was ensuring that the sanction was being appropriately targeted at offenders who would otherwise be facing terms of imprisonment—i.e., avoiding net-widening. The second related to the provision of adequate resources:

If the resources are not in place (either through dedicated allocation or reallocation of moneys or resources) criminal justice responses, such as

²¹⁸ National Survey, *supra* note 111 at p. ix.

²¹⁹ Doob, *supra* note 2 at p. 423.

²²⁰ Wasik, M. (1994). Sentencing guidelines: The problem of conditional sentences. *Criminal Justice Ethics*, 50–57, at p. 53.

²²¹ See Roberts et al., *supra* note 13 at p. 9 (Table 2.9).

²²² *Ibid* at p. 10 (Table 2.11). Almost one-third (32.5%) of judges indicated that they did not know whether conditional sentences were adequately supervised in their area.

²²³ *Ibid* at p. 10 (Table 2.12).

alternative measures, restorative justice and conditional sentences, predicated on community involvement would seem doomed to failure.²²⁴

And so, we can see even at this early stage, that the seeds of potential failure had been sown. Indeed, as we approached “the end of the beginning” in the late-1990s, we had a new sanction that appeared to be failing in its express purpose of reducing the use of imprisonment. Despite efforts taken to avoid the inappropriate application of conditional sentences, early evidence suggests that judges were not restricting their use of the sanction to cases in which they would otherwise be imposing prison terms. It was unclear, at that point, what the problem was—in other words, why conditional sentences were not being used as an alternate form of imprisonment. Was it the sanction’s unfortunate construction, confusion over its primary goal, or resemblance to probation? Alternatively, was the problem related to the lack of resources provided for offender monitoring, or the public’s lack of acceptance of non-custodial sentences for more serious offences or habitual offenders? In an ironic twist, it appeared that a sanction created as a mechanism of restraint might ultimately have acted to increase the use of imprisonment in some cases (e.g., as a result of offenders who were not otherwise facing custodial sentences breaching conditional sentence orders). Put another way, the beginning was a time of more questions than answers.

2.2 The end of the beginning: The Supreme Court of Canada steps in

Despite the many challenges associated with conditional sentences, judges were using the sanction in the early years. Between September 6, 1996 and September 30, 1999 there were 42,941 conditional sentence orders imposed in Canada—31.3% of these were for offences against the person; 38.7% for offences against property; and 11.0% for drug offences.²²⁵ Notably, there was considerable variation across provinces/territories. Of the three jurisdictions which provided information on conditional sentences as a percentage of all admissions to correctional supervision (most serious sentence), Saskatchewan showed the highest ranking (11.7%), followed by BC (7.9%),

²²⁴ La Prairie, C. (1999). Some reflections on new criminal justice policies in Canada: Restorative justice, alternative measures and conditional sentences. *Australian and New Zealand Journal of Criminology*, 32(2), 139–152, at p. 149.

²²⁵ La Prairie, *supra* note 185 at p. 2. The remaining 19% was accounted for by driving offences, administration of justice offences, and “other.”

and Ontario (5.3%).²²⁶ No doubt the variability noted across provinces/territories reflected, at least in part, the different interpretations of section 742.1 offered by the various appellate courts.²²⁷

2.2.1 Conflicting interpretations at the appellate court level

The provincial appellate courts disagreed on fundamental points related to the new sentencing provisions. The conservative approach was represented by the Alberta Court of Appeal's decision in *Brady* which expressed considerable skepticism regarding the new sanction, suggesting that "it [the conditional sentence] fills a small gap which previously existed."²²⁸ The Court questioned the underlying fiction of conditional sentences: "saying that such a conditional sentence is tantamount to imprisonment does not make it so,"²²⁹ and questioned the distinction between conditional sentences and suspended sentences in terms of restrictiveness.²³⁰ The applicability of the Sword of Damocles metaphor was explicitly rejected:

Even if a conditional sentence could be equated to a sword, it does not hang by a thread, but by a rope. And the *only* way that this rope can break is if *the offender himself cuts it*.... And with each passing day of the sentence, the "sword" shrinks until finally it becomes a butter knife.²³¹

The Court in *Brady* did not see conditional sentences as appropriate for crimes which carry a presumption of incarceration (based on the need for general deterrence and denunciation),²³² and expressed concern that the sanction would undermine respect for the law.²³³

²²⁶ *Ibid* at p 3.

²²⁷ See discussion in Manson, *supra* note 16.

²²⁸ *R. v. Brady*, 1998 ABCA 7, at para 16.

²²⁹ *Ibid* at para 48.

²³⁰ "In reality...conditional sentences are either virtually identical in terms and effect to a suspended sentence or only marginally more restrictive." *Ibid* at para 36.

²³¹ *Ibid* at para 46.

²³² "For crimes [carrying a presumption of incarceration], conditional sentences will not be appropriate in the usual case" *ibid* at para 32.

²³³ "Such respect [for the law] is endangered where the community sees that wrongdoers are not receiving their just deserts for their crimes" *ibid* at para 59.

The liberal position, on the other hand, took Parliament at its word by seeking to use conditional sentences as true alternatives to incarceration.²³⁴ This view was represented by the Ontario Court of Appeal decision in *Wismayer*.²³⁵ The judgment distinguished conditional sentences from suspended sentences primarily on the basis of the breach mechanism, noting that “the procedure under s.742.6 appears to be more straightforward than the little-used procedure for revoking probation.”²³⁶ It was the sanction’s enforceability and the real threat of incarceration that led the court to accept the fiction of conditional sentences as terms of imprisonment served in the community.²³⁷

Unlike *Brady*, the Court in *Wismayer* accepted the Sword of Damocles metaphor, noting that the offender is under the “constant threat of imprisonment...[and] the conditional sentence order can be a much heavier sentence than a brief sentence of imprisonment from which the offender will be paroled.”²³⁸ Notably, the Court refers to the highly restrictive nature of conditional sentences, suggesting that offenders will “often” be subject to house arrest.²³⁹ It was their onerousness and restrictive nature, in fact, that led the Court to conclude that conditional sentences could achieve the sentencing objectives of general deterrence²⁴⁰ and denunciation.²⁴¹

The decisions in *Brady* and *Wismayer* are broadly representative of the early legal debate that occurred in Canada around the appropriate role of conditional sentences. The wonderful thing about this debate, according to Healy, was that “according to Part XXIII itself [sentencing provisions], nobody [was] really or

²³⁴ Gemmell, *supra* note 180 at p. 71.

²³⁵ *R. v. Wismayer*, 1997 CarswellOnt 969 (ONCA).

²³⁶ *Ibid* at para 40. The court goes on to add that “it is also easier than proof of breach of probation which, being a criminal offence, requires proof beyond a reasonable doubt.”

²³⁷ “This procedure [for breach] ...reinforces the point that this is a sentence of imprisonment that the offender is permitted to serve in the community.” *Ibid* at para 41.

²³⁸ *Ibid* at para 56.

²³⁹ *Ibid* at para. 56. As noted, the data on the early use of conditional sentences did not support this conclusion. In a study that reviewed 700 conditional sentences imposed in Ontario between 1997 and 1998 house arrest was ordered in just under 3% of conditional sentences. Roberts, et al., *supra* note 184 at p. 18.

²⁴⁰ “The objective of general deterrence can be achieved through the conditional sentence of imprisonment.” *Ibid* at para 53.

²⁴¹ “I cannot accept that a conditional sentence of imprisonment is unavailable where the paramount consideration is denunciation of the offender’s conduct.” *Ibid* at para 56.

demonstrably wrong.”²⁴² And so, after less than three years in existence, the future of conditional sentencing was very much uncertain. Potentially misapplied, certainly misunderstood and under-resourced, the sanction teetered on the brink of failure in terms of its primary goal. In addition, the ambiguity of the legislation led to conflicting decisions amongst provincial appellate courts, raising yet another potential risk for the young sanction. There was great need for further clarification, either from Parliament or the Supreme Court, and Parliament took a pass. This is the context within which the Supreme Court of Canada entered the debate.

2.2.2 Settling the immediate conflict: The *Proulx* decision

In January of 2000, the Supreme Court of Canada clarified the intent, scope, and application of s.742.1 in a set of cases represented by *R. v. Proulx*.²⁴³ In its unanimous decision, the Court started by unambiguously declaring conditional sentences to be a direct response to the overuse of imprisonment:

By passing [Bill C-41], Parliament has sent a clear message to all Canadian judges that too many people are being sent to prison. In an attempt to remedy the problem of overincarceration, Parliament has introduced a new form of sentence, the conditional sentence of imprisonment.²⁴⁴

Establishing the principles meant to govern the new sanction required that the Court situate conditional sentences on the scale of existing sanctions and distinguish the sanction from the suspended sentence. Implicit in the *Proulx* decision was the opinion

²⁴² Healy, P. (1999). Questions and answers on conditional sentencing in the Supreme Court of Canada. *Criminal Law Quarterly*, 42(May), 12–37, at p.16. Healy suggests that the problem relates to points of ambiguity within the conditional sentencing provisions, set against the ambiguity of ss. 718 through 718.3. How can any court, he asks, discern Parliament’s intention “in the thicket of riddles and buzz-phrases found in Part XXIII?” (at p. 16)

²⁴³ *Proulx*, *supra* note 14. The accused in *Proulx* entered guilty pleas to one count of dangerous driving causing death and one of dangerous driving causing bodily harm. The judge concluded that a conditional sentence would not satisfy the objectives of denunciation and deterrence in this case and imposed a sentence of 18 months incarceration. This decision was overturned by the Manitoba Court of Appeal and a conditional sentence was substituted for the jail term.

Proulx was one of five cases related to conditional sentences heard by the Court in 1999; judgment was pronounced on all five cases on the same day. *Proulx* and two others (*R. v. RNS*, 2000 SCC 7; *R. v. RAR*, 2000 SCC 8) had sentences of imprisonment restored; conditional sentences were maintained in only two (*R. v. Bunn*, 2000 SCC 9; *R. v. LFW*, 200 SCC 6).

²⁴⁴ *Proulx*, *supra* note 14 at 1.

that conditional sentences up to that point had been insufficiently onerous and not adequately distinguished from probation.

Some have framed *Proulx* as the high court's effort to salvage or breathe life into the struggling sanction.²⁴⁵ Indeed, the decision went a long way in ensuring that conditional sentences had some penal "bite" to them. First, in recognition of the relative leniency of the conditional sentence, the Court encouraged judges to make them longer than the terms of incarceration they were meant to replace.²⁴⁶ Second, the Court suggested that onerous conditions (including curfews and house arrest) should be the norm.²⁴⁷ Finally, the Court stressed that there should be a presumption of incarceration in cases of proven breach. Dealing sternly with non-compliance was necessary to confirm their punitive nature, promote compliance, and further distinguish conditional sentences from suspended sentences.

In *Proulx*, the Court established a two-step methodology designed to limit inappropriate application of the new sanction (net-widening). The first step required a decision that the offender would otherwise have been sentenced to a term of traditional imprisonment for a period of less than two years. The sentencing judge must explicitly consider and reject any form of non-institutional sanction (e.g., a fine or suspended sentence) as well as the necessity of a penitentiary term (more than two years imprisonment). Having discarded the "low-ball and high-ball" options, the second step required judges to consider whether serving the term of imprisonment in the community

²⁴⁵ Webster & Doob, *supra* note 1 at p. 173.

²⁴⁶ Extending the term of conditional sentences also maintains the fundamental principle of proportionality. *Proulx*, *supra* note 14 at para 54.

²⁴⁷ The imposition of onerous conditions was necessary to: distinguish conditional sentences from suspended sentences with probation; achieve the objectives of denunciation and deterrence; and ensure that offenders do not avoid punishment. *Ibid* at paras 35-39.

would endanger community safety;²⁴⁸ and be consistent with the purposes and principles of sentencing as set out in ss. 718 to 718.2.²⁴⁹

The Court chose not to restrict judicial discretion in terms of eligible offences, confirming that a conditional sentence is available for any offence that satisfies the minimal statutory requirements, and left it to lower court judges to determine whether the objectives of deterrence and denunciation could be adequately addressed in any specific case.²⁵⁰ As Roberts and Gabor (2004) noted, at the time (i.e., prior to restrictions) the two-year ceiling effectively made conditional sentences available for a broad range of offences considered to be serious or violent by most members of the public (e.g., robbery, sexual assault, trafficking in narcotics and manslaughter).²⁵¹ Like Parliament, the Court appeared unwilling to make difficult decisions that might limit judicial discretion.

2.2.3 The ‘red lights’ of post-*Proulx* challenges (2000-2012)

Manson (2001) questioned the appropriateness of having the Supreme Court assume the role of sentencing reformer, while acknowledging that the Court had no choice given the enigmatic statutory framework: “the Supreme Court has crafted a new intermediate sanction. While many people have argued that we needed one, I doubt if anyone expected the Supreme Court to be its designer.”²⁵² Such sentiments reflect the fundamental (and ongoing) debate regarding which agency is best suited to establish broad sentencing policy in Canada. In that sense, the tension between government and the judiciary continued throughout the next decade. More importantly, instead of

²⁴⁸ In terms of assessing whether community safety would be endangered by having an offender serve his/her sentence by way of a conditional sentence order, the Court placed the onus on the sentencing judge to know, or be made aware of, the level of supervision available in the community, suggesting that in cases where “the level of supervision available in the community is not sufficient to ensure safety of the community, the judge should impose a sentence of incarceration.” *Proulx*, *supra* note 14 at para 73.

²⁴⁹ Manson, A. (2001). The Conditional Sentence: A Canadian approach to sentencing reform, or doing the time warp again. *Criminal Law Quarterly*, 44(3), 375, at p. 381.

²⁵⁰ “No offences are excluded from the conditional sentencing regime except those with a minimum term of imprisonment, nor should there be presumptions in favour of or against a conditional sentence for specific offences.” *Proulx*, *supra* note 14 at para 127.

²⁵¹ Roberts & Gabor, *supra* note 30 at p. 98.

²⁵² Manson, *supra* note 249 at p. 377.

resolving early warning signs, the yellow light regarding conditional sentences gradually begins to turn red.

2.2.3.1 Proulx's double-edged sword

Punitive goals—widening the net on the custodial side

The decision in *Proulx* both salvaged a struggling sanction and set the stage for it to fail in the future. Optimistically, by framing conditional sentences as punitive sanctions capable of satisfying the objectives of denunciation and deterrence, the Court gave sentencing judges the practical guidance, methodology and language they needed. More importantly, by confirming that conditional sentences could be imposed for any offence that satisfied the minimal requirements, the Court implicitly encouraged their use in more serious cases, increasing the likelihood that the sentences represented true diversions from prison.

And, in fact, researchers of the era would appear to agree. By 2002, academics were reporting a 13% drop in the rate of admissions to custody and crediting conditional sentences for “a reduction in the use of custody on a scale unparalleled in western nations.”²⁵³ Equally notable, Roberts and Gabor examined the net-widening phenomenon in studies published in 2003 and 2004. Using correctional admissions data that spanned the period between 1993 and 2001, the authors estimated that only 5,399 of the 53,990 diversions from custody represented offenders who would have been sentenced to a non-custodial option prior to 1996.²⁵⁴ They offered a rather benign interpretation, suggesting that a limited amount of net-widening may be the price to pay for substantial reductions in sentenced admissions to custody. Upon the release of these findings, the academic debate on net-widening effectively ended, notwithstanding issues raised by their analysis.²⁵⁵ Indeed, their optimistic conclusions were revisited years later

²⁵³ Roberts references a 13% reduction in the rate of admissions to custody between 1997 and 2001. Roberts, *supra* note 2020 at p. 268.

²⁵⁴ Roberts, J. V., & Gabor, T. (2003). The impact of conditional sentencing: Decarceration and widening of the net. *Canadian Criminal Law Review*, 8(June), 33–49, at p. 40. Using the same data, the authors refer to net-widening at 1%. See Roberts & Gabor, *supra* note 30 at p. 102.

²⁵⁵ The Roberts & Gabor study raised several methodological issues. First, the decision to calculate average rates per 10,000 *charged* over four years ignores variations between years and the impact of prosecutorial charge approval in some, but not all provinces. Second, it is unclear whether offenders admitted to terms of imprisonment after conditional sentence orders were

as part of the analysis conducted by Reid and Roberts in 2019. In hindsight, the authors note, overall gains (in the reduced use of imprisonment) attributed to the introduction of conditional sentences masked large provincial variations.²⁵⁶

In brief, conditional sentence utilization is generally believed to have increased in the wake of the *Proulx* decision.²⁵⁷ Not only did we see more conditional sentence orders, there was evidence that they were being applied to more serious offences, that sentence lengths were being extended, and more onerous conditions (house arrest and curfew) were being imposed.²⁵⁸ More pessimistically though, while supporters of conditional sentencing saw such increases as positive, some warned that the Court may go too far in widening the net on the custodial side.²⁵⁹ While it may seem counter-intuitive to warn of a decarcerative strategy being too effective, the concern was that raising the ceiling on offence seriousness (e.g., to include violent offences) might attract negative public or community comment, especially in higher profile cases. And, in fact, precisely by making it more likely that conditional sentences would be capturing offenders who would otherwise be facing imprisonment (e.g., on serious offences), this decision ultimately provoked public resistance and established the conditions necessary for the success of the Conservative Party's tough-on-crime rhetoric in later years.

Restorative goals – the devil in disguise

The second “double-edged” outcome of *Proulx* involves the decision's broad definition of “restorative” sentencing objectives and explicit application to conditional

terminated were being counted as the former or the latter (or both). More importantly, the data only allows the authors to look at the impact conditional sentences had on prison admissions; no information is provided regarding the impact of conditional sentences on the specific use of suspended sentences (or fines). See also Webster & Doob, *supra* note 1 at pp. 180-182.

²⁵⁶ Reid & Roberts, *supra* note 1 at p. 8.

²⁵⁷ There was a reported 8% increase in conditional sentence utilization nationally between 2000/2001 and 2003/2004 - based on admissions to correctional supervision, by type. See Statistics Canada. (2006). *Adult correctional services in Canada, 2004/2005*, by K. Beattie, in Juristat: 26:5, No. 85-002-XIE. (Ottawa: Statistics Canada), at p. 12.

²⁵⁸ Roberts, *supra* note 20. In a BC study that compared 614 pre-*Proulx* and 647 post-*Proulx* conditional sentences, curfews and house arrest requirements increased from 14.7% and 7.3% pre-*Proulx* to 50.2% and 10.7% post-*Proulx*. See North, D. M. (2002). *Imprisonment without incarceration: Bill C-41, the Supreme Court, and the challenges of conditional sentencing* (unpublished MA Thesis, Simon Fraser University), at pp. 75—76.

²⁵⁹ “While Lamer C.J.C. was concerned in *Proulx* with ensuring that the conditional sentence did not widen the net by moving into an area previously occupied by non-custodial sanctions, the resulting sanction may have widened the net at the other end.” Manson, *supra* note 249 at p. 396.

sentencing. Having earlier defined conditional sentences as punitive tools for prison reduction, the Court complicated things when elaborating on the nature of the sanction by introducing a second (and possibly conflicting) goal. Specifically, it affirmed that:

Two of the main objectives underlying [Bill C-41] were to reduce the use of incarceration as a sanction and to give greater prominence to the principle of restorative justice in sentencing—the objectives of rehabilitation, reparation to the victim and the community, and the promotion of a sense of responsibility in the offender.

The conditional sentence facilitates the achievement of both of Parliament's objectives.²⁶⁰

Prioritizing prison reduction promotes the appropriate application of conditional sentences as a punitive response and, by extension, reduces the likelihood of net-widening. By incorporating restorative objectives, especially offender rehabilitation, the Court practically invites judges to use conditional sentences in place of probation orders—i.e., as special deterrents.²⁶¹ After all, if you are a judge who believes that doing something (e.g., completing a drug treatment program) will achieve a positive outcome (e.g., reduced recidivism), would you not choose to attach those conditions to an order that is supported by an effective compliance mechanism? Not only did the re-branding of conditional sentences (as rehabilitative tools) “muddy the water” in terms of the reason for which the sanction was created (prison reduction), it also enabled judges to use it under a special deterrent theory of sentencing, thereby increasing the likelihood of net-widening in its application.

2.2.3.2 The cost of inadequate resourcing – credibility and public support

Monitoring and supervision: Tight controls or paper tigers?

In *Proulx*, the court emphasized the need for community resources, including those necessary for adequate monitoring and supervision of offenders:

Hence, the judge must know or be made aware of the supervision available in the community by the supervision officer or by counsel. If the level of

²⁶⁰ *Proulx*, *supra* note 14 at paras 99-100. In summarizing the decision, the Court suggests that “Where a combination of both punitive and restorative objectives may be achieved, a conditional sentence will likely be more appropriate than incarceration” (at para 113).

²⁶¹ For a discussion of restorative justice, net-widening, and *Proulx*, see Roach, *supra* note 161.

supervision available in the community is not sufficient to ensure safety of the community, the judge should impose a sentence of incarceration.²⁶²

However, subsequent jurisprudence from provincial appellate courts effectively neutered this requirement.²⁶³ In 2002, the Ontario Court of Appeal adopted the position taken earlier (2000) by the Manitoba Court of Appeal on the issue of resourcing, declaring that “it cannot be up to the will of any province to effectively preclude the imposition of conditional sentences by failing to provide sufficient supervisory resources.”²⁶⁴

This position, of course, raises more problems than it solves. On the one hand, it prevents funding limitations from getting in the way of what would otherwise be a non-custodial (conditional) sentence. This will either motivate provincial governments to find funds or to live with the consequences of not doing so. On the other hand, those consequences include not monitoring the very conditions (i.e., house arrest, curfews) that the Supreme Court of Canada has deemed necessary to confirm the punitive nature of the sanction, support its ability to satisfy the sentencing objectives of deterrence and denunciation, distinguish conditional sentences from probation orders, and promote public confidence in sentencing decisions.²⁶⁵ As the court in *Brady* concluded, imposing a conditional sentence which would likely not be complied with is a waste of time and money, and unlikely to produce the desired outcomes. More importantly perhaps, “the sentence will suggest to the offender and to those around him, that the law and the courts are a paper tiger.”²⁶⁶

In the post-*Proulx* era, the lack of systematic monitoring continued to be raised by justice system participants, undermining conditional sentences as credible sanctions. For example, arguing against a conditional sentence for a manslaughter conviction, one prosecutor in BC advised the court that, at most, house arrest conditions would only be

²⁶² *Proulx*, *supra* note 14 at para 73.

²⁶³ For an early review of this issue, see Mazey, E. (2002). Conditional sentence under house arrest. *Criminal Law Quarterly*, 46(2), 246.

²⁶⁴ *R. v. Nault*, 2002 CarswellOnt 1693 at para 17; *R. v. Makar*, 2000 MBCA 69.

²⁶⁵ On this point, see also Roberts, *supra* 197.

²⁶⁶ *Brady*, *supra* note 228 at paras 129-130. It should be noted that the Court in *Brady* was dealing with the enforceability of conditions and did not specifically address the lack of enforcement (i.e., monitoring) issue.

supervised during daytime business hours, Mondays through Fridays.²⁶⁷ The lack of monitoring was confirmed days later by a spokesman for Correctional Services (BC) who explained that no added funding was provided to the service when the new sanction was introduced in 1996.²⁶⁸ And so we see, yet again, the system failing to support efforts to monitor offenders serving prison terms in the community—hardly what the public was told to expect by a government that repeatedly promised “tight controls” for such offenders.²⁶⁹

Public confidence—public resistance

Public concern around sentencing practices in the decade following *Proulx* brought growing tensions, with Parliament and the Courts each struggling to assert control in this area of law. As sentencing judges extended the application of conditional sentences post-*Proulx* to more serious offences, the public became increasingly sensitized to perceived leniency.²⁷⁰ In the context of conditional sentencing, this was promoted by provocative media headlines that focused primarily on the practical impacts of the order (i.e., that it is not jail) without providing necessary detail about the nature of (and rationales for) conditional sentences.²⁷¹ In that sense, the new sanction engaged concerns around “truth in sentencing” and being “soft on crime,” both of which are relevant to maintaining public confidence in the decisions made. Consider, for instance, the following post-*Proulx* headlines on conditional sentence cases in British Columbia:

- Man convicted in fatal shooting of his pal won’t serve any time in jail.²⁷²

²⁶⁷ Bellett, G. (2000, Aug 29). House arrest monitored only 9-5, prosecutor says. *Vancouver Sun*, B4.

²⁶⁸ Furguson, D. (2000, Sept 3). Breaches of house arrest “very high.” *Tri-City News*, p. 13.

²⁶⁹ See comments of Minister of Justice, *supra* note 215; and DOJ News release, *supra* note 155.

²⁷⁰ Roberts, J. V. (1999). Sentencing trends and sentencing disparity. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (pp. 137–159). University of Toronto Press, at p.137; Doob, A. N., & Webster, C. M. (2008). *Concern with leniency: An examination of sentencing patterns in British Columbia*. (University of Toronto and the University of Ottawa).

²⁷¹ According to Roberts the media has consistently promoted the view that conditional sentences are tantamount to ‘get out of jail’ free cards, with offenders facing virtually no consequences. Roberts, *supra* note 172 at p. 137.

²⁷² Canadian Press. (2000, Feb 17). Man convicted in fatal shooting of his pal won’t serve any time in jail. *Vancouver Sun*, A13.

- No jail for driver who killed two.²⁷³
- Repeat sex offender's victim angry at community sentence.²⁷⁴
- Put this thug away, frustrated cop pleads in letter to Crown.²⁷⁵

Not only did the media take every opportunity to comment on individual cases in which conditional sentences had been imposed on serious offences, it also weighed in generally on the sanction.²⁷⁶ An editorial appearing in the *National Post* (2000) hyperbolically suggested that the Supreme Court of Canada's decision in *Proulx* had effectively severed any connection between crime and punishment. Critical of what it described as "judicial ad hoc-ery," the editorial focused primarily on the issue of discretion in sentencing, arguing that what the court rejects as "rigidity" the public expects as "consistency." The editorial included an implicit condemnation of the use of conditional sentences for more serious offences:

Since 1996, judges have handed down 23,000 conditional sentences across Canada, including one to a woman who stabbed her husband as he slept. Such sentences have been purchased at the price of increasing public disquiet over the criminal justice system. Parliament would be wise to amend the law. Justice should be done consistently, not conditionally.²⁷⁷

Statements made by judges and former judges over the years have reflected and perpetuated the media narrative on conditional sentences.²⁷⁸ As one Ontario judge put it: "I think offenders think it's a joke. I see it as 'fake jail.' I have a close friend who is a probation officer and have heard stories about people laughing when they are given a conditional sentence. They see it as getting off."²⁷⁹ The notion that offenders react

²⁷³ Clark, G. (2000, June 7). No jail for driver who killed two. *Vancouver Province*, A12.

²⁷⁴ Canadian Press. (2000, December 10). Repeat sex offender's victim angry at community sentence. *Vancouver Province*, A36.

²⁷⁵ Dawson, F. (2000, June 23). Put this thug away, frustrated cop pleads in letter to Crown. *Vancouver Province*, A3.

²⁷⁶ General reporting on conditional sentencing tended to be similarly negative: 1) Skelton, C. (2000, February 1). Sex offenders eligible for house arrest. *Vancouver Sun*, A6; 2) Blanchfield, M. (2000, February 1). Violent offenders eligible for conditional sentences. *National Post*, A19; 3) Austin, I. (2000, April 25). Send 'em to jail, say B.C. and Ontario. *Vancouver Province*, A12.

²⁷⁷ Editorial. (2000, February 1). Conditional justice. *National Post*, A19.

²⁷⁸ See, for instance: 1) Kerans, Roger, "Go to your room!" *The Globe and Mail*, February 3, 2000 at u/k (Roger Kerans was appointed to the Alberta Court of Appeal in 1980 and retired in 1997); and 2) Craig, Wallace, "Conditional sentences are judicial cop-outs", *North Shore News*, October 20, 2004, p. 7 (Wallace Craig was a Provincial Court Judge in BC from 1975 to 2001).

²⁷⁹ Stephens, *supra* note 161 at p. 46.

positively—even celebrate—being sentenced to serve a conditional sentence suggests that the sanction is not being experienced as a true punishment. Take, for instance, the 2007 BC case of Tuan Nguyen, an offender who was placed on a 20-month conditional sentence for his role in an attack that left the victim a quadriplegic.²⁸⁰ The decision not to incarcerate him was already controversial; when the media aired footage of Mr. Nguyen and his friends laughing as they entered an elevator to leave the court, this quickly turned to outrage.²⁸¹ While the conditional sentence in the *Nguyen* case was set aside by the BC Court of Appeal six months later, in many ways the damage to the reputation of the justice system had already been done.²⁸²

2.3 The beginning of the end: A totally predictable and completely foreseeable outcome

2.3.1 Yet more efforts to salvage CSOs – bites and caps

Perhaps recognizing the threat that growing public opposition posed to the new sanction and, by extension, its effectiveness in reducing the use of imprisonment, reformers stepped in with recommendations designed to promote public acceptance of conditional sentencing. These proposals focused either on the need to make the sanction more clearly and consistently punitive, or on restricting sentence length to indirectly remove conditional sentences as an option for more serious offences (which would generally be expected to attract longer terms).

Increasing penal bite

Notwithstanding the references in *Proulx* that encourage judges to include punitive conditions, there is no requirement that they do so,²⁸³ nor is there a requirement that provincial authorities actively monitor and enforce the conditions that are imposed.

²⁸⁰ *R. v. Nguyen*, 2007 BCPC 386.

²⁸¹ Mason, G. (2008, February 14). B.C. Judges: Compassionate, or lenient beyond reason? *Globe and Mail*. Retrieved from <https://www.theglobeandmail.com/news/national/bc-judges-compassionate-or-lenient-beyond-reason/article718136/>

²⁸² *R. v. Nguyen*, 2008 BCCA 252.

²⁸³ The Ontario Court of Appeal went further, holding that a “...conditional sentence must carry with it some form of punitive terms such as house arrest and/or a curfew.” *R. v. Chartier*, 2007 ONCA 706 at para 5.

Given that conditional sentences are largely defined by their optional conditions, the continued deference to judicial discretion is problematic in that it frustrates attempts to locate the sanction on a scale of penal severity. Conditional sentences can be very restrictive and tightly monitored, with proven breaches resulting in swift incarceration; they can also be minimally restrictive, with no proactive monitoring or meaningful response to proven breaches. One is not the same as the other.

In response, Renwick (2008) proposes that onerous conditions on conditional sentences be legislatively mandated, warning that “until courts can impose appropriate conditions and clearly explain their rationale for avoiding incarceration, offenders lucky enough to receive a conditional sentence will sense that they have dodged a penal bullet while their victims will believe that they have caught one.”²⁸⁴ Drawing on the work of Roberts, Renwick proposes mandatory conditions that would replicate carceral impacts at all levels—physical, social, psychological and impersonal²⁸⁵ (e.g., house arrest, no guests, no driving or internet). Compliance with these conditions would be maintained through proactive monitoring, and proven non-compliance (breach) would result in the order being terminated and the balance of the term being served in prison.

Seeking to make conditional sentences more like prison terms may address proportionality issues or partially satisfy public concerns that offenders are not being adequately punished (i.e., not simply sitting around “watching TV”). However, in addition to increased breach rates, the danger inherent in the “penal equivalency” strategy is that for some serious or violent offences it is unlikely that sanctions that do not involve actual custody will ever be accepted by the public as true equivalents. In such cases, Bottoms (2017) warns of the possibility of “infinite escalation,” with community penalties being

²⁸⁴ Renwick, G. P. (2008). Conditional acceptance of the conditional sentence. *Canadian Criminal Law Review*, 12(Sept), 227, at p. 243. Renwick’s recommendations raise several practical challenges. First, as the onerousness of conditions increases, we can reasonably expect corresponding increases in non-compliance. If incidences of breach increase and if incarceration is mandated upon proven breach, any gains in terms of prison reduction would be largely negated. Second, the invasiveness of some recommended conditions raises issues around privacy and collateral impacts, both for the offender and for others who may reside in the same residence. Finally, the costs of proactive monitoring of restrictive conditions, which has arguably not occurred in any systematic way since their introduction, could be prohibitive and would be borne by the provincial, not federal, governments.

²⁸⁵ “Impersonal” impacts are intended to remind the offender that they are serving a term of imprisonment, for example by restricting “personal luxuries” like cellphones or the internet. *Ibid* at pp. 239-243. Renwick’s proposal draws upon Roberts’ table of differences between institutional and community custody. See Roberts, *supra* note 172 at p. 44.

repeatedly made more punitive to address calls for tougher responses.²⁸⁶ As the Ouimet Report warned:

The offender must be protected against rehabilitative measures that go beyond the bounds of the concept of justice. ...Treatment is not more humane than punishment if it imposes more pain, restricts freedom for longer periods, or produces no results regarded as desirable by the individual concerned.²⁸⁷

Reduced scope

Sentencing theorists have recognized from the beginning that one of the greatest threats to the success of conditional sentencing (particularly in reducing the use of imprisonment) would be their use in cases involving serious offences. Julian Roberts, who has written prolifically on this issue, suggested as early as 1997 (pre-*Proulx*) that Parliament resolve the problem by considering legislative restrictions that would limit the sanction's scope and application. Two such suggestions included either restricting conditional sentences to identified offences (e.g., non-violent offences) or offenders (e.g., first time offenders); or lowering the sentence length ceiling from two years to one.²⁸⁸ In the wake of *Proulx*, Roberts and Gabor (2004) focused, instead, on the proposal to cap conditional sentences at 12 months, suggesting that this would avoid much of the controversy without significantly impacting the gains achieved in terms of reduced incarceration.²⁸⁹ Subsequent suggestions have included a cap on conditional sentences for serious offences at 12 months while leaving the existing “two years less one day” cap for all other offences.²⁹⁰ More recently, Reid and Roberts (2019) suggest the ceiling should be lowered, perhaps in conjunction with a greater focus on expanding

²⁸⁶ Bottoms, A. (2017). “Punishment” in non-custodial sentences: A critical analysis. *Criminal Law Forum*, 28(3), 563–587, at p. 584. See also CSC, *supra* note 38 at p. 371 “...community sanctions should not attempt to resemble incarceration by attracting conditions which are so arduous that they approximate the degree of constraint implied by custody.”

²⁸⁷ Ouimet Report, *supra* note 41 at p. 16.

²⁸⁸ Roberts, *supra* note 150 at p. 199. Other proposals designed to promote conditional sentences have included: increasing their penal “bite”; developing penal equivalences; and allowing split sentences (traditional imprisonment followed by community imprisonment).

²⁸⁹ Roberts & Gabor, *supra* note 30 at p. 101. The majority of conditional sentences are for terms of less than 12 months; the authors estimate that setting the ceiling at 12 months would reduce usage by only 14% (at p. 101).

²⁹⁰ Roberts, J. V. (2006). Reforming conditional sentencing: Evaluating recent legislative proposals. *Criminal Law Quarterly*, 52, 18–27, at pp. 32-33.

the use of conditional sentences for offences that would otherwise have received relatively short terms of incarceration (e.g., less than three months).²⁹¹

The argument against legislative restrictions

While Roberts initially raised the possibility of restricting conditional sentences to identified offences or offenders in 1997, by 2004 he was arguing against such proposals, raising concerns around statutory exclusions. In terms of offender-specific exclusions (e.g., non-violent, or first-time offenders), there could be instances in which a conditional sentence may nonetheless offer the most appropriate response. Roberts (2004) refers, for instance, to “special needs offenders” who would either benefit the most from a treatment-oriented community disposition (e.g., those dealing with drug addictions), or for whom the court has been directed to make extra efforts to craft non-custodial sentences (e.g., Indigenous offenders).²⁹²

Offence-specific restrictions are equally, if not more, problematic. First, as Roberts points out, excluding certain offences prejudices relative offence seriousness, thereby raising proportionality concerns, given the broad spectrum of severity within each offence category.²⁹³ Section 718.1 of the *Criminal Code* does not limit the proportionality requirement to offence gravity; it envisions an assessment of offender culpability as well.²⁹⁴

Second, the identification of categories of offences for exclusion lends itself to political manipulation, allowing politicians to legislate restrictions in response to public concerns that may or may not be consistent with principled public policy. Lists of restricted offences are rarely reduced. On the contrary, they are often extended,

²⁹¹ Reid & Roberts, *supra* note 1 at p. 18. The authors note that approximately 80% of jail sentences in 2014/2015 were for periods of three months or less.

²⁹² Roberts, *supra* note 172 at p. 167.

²⁹³ *Ibid* at p. 165.

²⁹⁴ 718.1 of the *Criminal Code* states that “A sentence must be proportionate to the gravity of the offence *and the degree of responsibility of the offender*” (emphasis added).

Paciocco and Roberts (2005) make this point in their argument against excluding conditional sentences for charges of impaired driving causing death or bodily harm, suggesting that judges should retain discretion in order to address difficult cases in which mitigating factors make a conditional sentence an appropriate disposition. See Paciocco, D. M., & Roberts, J. V. (2005). *Sentencing in cases of impaired driving causing bodily harm or impaired driving causing death, with a particular emphasis on conditional sentencing*. Ottawa: Canada Safety Council, at p.2.

especially by governments open to establishing sentencing policy based on notions of popular punitiveness as opposed to principle or empirical evidence. Sentencing becomes a political resource and the serious issues identified by the Canadian Sentencing Commission in 1987 remain unresolved.

Finally, and most relevant to the focus of this research, simply excluding offences without a thorough consideration of the larger sentencing framework could result in the anomaly of having offenders who are not eligible for a conditional sentence be eligible for other non-custodial options, including suspended sentences.²⁹⁵ Should Parliament address this by restricting all less severe penalties as well, then they will effectively create additional mandatory minimum jail terms, with all of their associated challenges.

2.3.2 Growing pressure to introduce legislative restrictions

Theorists debate the extent to which public opinion should drive sentence policy, but they no longer debate whether or not it does.²⁹⁶ It is clear from the above that *Proulx* did not resolve all of the issues raised by the introduction of the new sanction, particularly those related to public confidence. Indeed, in 2003, a group of five provincial Attorneys General released a position paper proclaiming their support for the “true” intent of Parliament, which was to make conditional sentences available for only minor (not serious) crimes.²⁹⁷ The proposal advocated prohibitions (or presumptions) against the use of conditional sentences for a series of serious offences, including offences involving serious violence, sexual assault, and driving offences involving death or serious bodily harm. Alternatively, it suggested that the ceiling on sentence length be lowered to one year, effectively eliminating it as an option for most serious offences.²⁹⁸ Though there have been no apparent efforts to shorten sentence terms, there have been several

²⁹⁵ Roberts, *supra* note 172 at p. 165.

²⁹⁶ Ryberg, J. & Roberts, J.V. (2014). Exploring the normative significance of public opinion for state punishment. In J. Ryberg & J. V. Roberts (Eds.), *Popular punishment: On the normative significance of public opinion*. New York, NY: Oxford University Press, at p. 1.

²⁹⁷ Alberta Justice and Attorney General. *The conditional sentence of imprisonment: The need for amendment* (Paper submitted to Standing Committee on Justice and Human Rights) (Alberta Justice and Attorney General, 2003). The five provinces represented include: Alberta, British Columbia, Manitoba, Ontario, and Nova Scotia.

²⁹⁸ *Ibid* at pp. 18-19.

legislative efforts to restrict the use of conditional sentences for certain offences or categories of offences.²⁹⁹

Most notably, the incoming Conservative minority government led by Stephen Harper had run on a populist tough-on-crime platform that promised more mandatory minimum penalties and fewer conditional sentences. In May of 2006, they introduced Bill C-9, legislation that would exclude conditional sentences for all offences that carried a statutory maximum penalty of ten years or more, and that were prosecuted by way of indictment.³⁰⁰ The Standing Committee that considered the bill ultimately restricted it, excluding only serious personal injury offences as defined in section 752, terrorism offences or criminal organization offences prosecuted by way of indictment.³⁰¹ As Roberts noted, “the marriage of politics and criminal policy-making seldom produces healthy offspring. Bill C-9 [is] no exception to this rule.”³⁰² Passed in 2007, the amendment created confusion in terms of the meaning of a “serious personal injury offence.”³⁰³

²⁹⁹ One notable effort—that ultimately failed—was introduced in October 2005 by a Liberal minority government. Bill C-70 would have made many categories of offences ineligible for conditional sentences unless the court was “satisfied that it is in the interests of justice to do so because of exceptional circumstances.” See Bill C-70, *supra* note 146. This legislation would have excluded conditional sentences for the specific offences of impaired driving causing bodily harm or death and the general categories of offences captured by: serious personal injury offences (per s. 752); terrorism or criminal organization offences; and any offence “in respect of which, on the basis of the nature and circumstances of the offence, the expression of society’s denunciation should take precedence over any other sentencing objectives” (Bill C-70 proposed wording of s. 742.1 (2)(d)).

Bill C-70 died on the order paper when the Liberals lost the election. Its introduction is nonetheless interesting in that it confirms that no party is immune to the politics of populism. As Doob and Webster (2016) point out, during the Conservative reign from 2006 to 2015 there was no consistent or sustained opposition to the party’s tough-on-crime sentencing reforms (Doob & Webster, *supra* note 80(c) at p. 380). There was a public perception that violent crime was rising and that existing responses were ineffective. This is important context for Bill C-70 and the view that it was a “harbinger of what was to come” with the Conservatives. As Doob observed in 2011, “politics is stronger than evidence” (Doob, *supra* note 166 at p. 287).

³⁰⁰ An editorial in the *National Post* entitled “Harper’s plan for a safer Canada” welcomed the philosophical shift towards harsher punishment that the legislation reflected, assuring its readers that “the Tories’ new crime strategy will make all of us safer.” See Editorial. (2006, May 9). Harper’s plan for a safer Canada. *National Post*, A16.

³⁰¹ See Appendix B (s.742.1).

³⁰² Roberts, *supra* note 290 at p. 34.

³⁰³ See Manson, et al., *supra* note 176 at p. 510.

The passage of Bill C-9 signalled the beginning of amendments designed to limit judicial discretion in the application of conditional sentences. In the context of a more general shift towards increased punitiveness in sentencing, many saw Bill C-9 as exemplifying crime policy that played well with the public.³⁰⁴ Importantly though, while Harper's Conservative government took punitive policies the furthest, all three national parties supported tough-on-crime platforms during the 2006 and 2008 elections, and during the Conservative minority government (2006-2011), opposition parties either failed to moderate, or explicitly supported, harsh sentencing policies.³⁰⁵

With a minority government (2006-2011), the Conservatives sought broader legislative restrictions on the use of conditional sentence orders, first through Bill C-42 (2009)³⁰⁶ and then through Bill C-16 (2010).³⁰⁷ Similar to the original drafting of Bill C-9, both bills sought to exclude all offences in which there was a maximum term of imprisonment of 14 years or life, and for specified offences prosecuted by indictment in which there was a maximum term of 10 years.³⁰⁸ When introduced in the House of Commons in May of 2010, there was a focus on the original intent of s.742.1, namely the need to provide parliamentary direction on sentencing policy and an interest in responding to public criticisms.³⁰⁹

³⁰⁴ On penal populism see, for example Roberts, J. V., & Bebbington, H. H. (2013). Sentencing reform in Canada: Promoting a return to principles and evidenced-based policy. *Canadian Criminal Law Review*, 17(3), at p. 334; Ryberg & Roberts, *supra* note 296.

³⁰⁵ See a) Doob, A. N., & Webster, C. M. (2013). The "Truth in Sentencing", Act: The Triumph of Form over Substance. *Canadian Criminal Law Review*, 17(3), 365–392; and b) Webster & Doob, *supra* note 70.

³⁰⁶ Bill C-42, *An Act to amend the Criminal Code (Ending Conditional Sentences for Property and Other Serious Crimes Act)* (Canada, 40th Parl., 2nd Sess.). This amendment sought to end conditional sentences for serious property and violent crimes. Introduced in June 2009 it died on the order paper when Parliament was prorogued.

³⁰⁷ Bill C-16, *An Act to amend the Criminal Code (Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act)* (Canada, 40th Parl., 3rd Sess.). This amendment basically re-created the language found in Bill C-42 (as above). Introduced in April 2010 it died on the order paper when Parliament was dissolved in March 2011.

³⁰⁸ For a full list of the offences that would have been affected by Bill C-16, see McLellan, *supra* note 207, footnotes 51 & 52.

³⁰⁹ Canada, Parliament, House of Commons, Debates, 40th Parl., 3rd Sess., Second Reading, May 3, 2010: Mr. Brent Rathgeber (Edmonton-St. Albert, CPC), at 1553-1555:

Bill C-16 proposes amendments to the Criminal Code to ensure that conditional sentences are never available for serious and violent offenders, and serious property offences which were never intended to be eligible for a conditional sentence in the first place.

Bill C-16 died on the order paper when Parliament was dissolved in March of 2011. Notably, the failure of the Conservatives to get their law-and-order legislation passed when sitting as a minority government led to an election platform that focused heavily on a crime control agenda. Re-elected with a majority in May of 2011, the Conservatives wasted no time in reintroducing conditional sentencing restrictions as part of a larger package of amendments known as Bill C-10 – *The Safe Streets and Communities Act* (short title).

2.3.3 The Safe Streets and Communities Act (2012) - Bill C-10

Introduced in September of 2011, Bill C-10 grouped together nine bills that had been dealt with separately (and not passed) in the prior Parliament. Among other things, the legislation tightened rules around conditional release, imposed or increased mandatory minimum sentences, and greatly expanded restrictions on the use of conditional sentences.³¹⁰ In terms of the latter, the restrictions mirrored the language of Bill C-16, significantly broadening the offences now ineligible for conditional sentences, including any offence against the person, and most offences against property, when prosecuted by indictment (see Appendix B). When announced in 2012, the Minister of Justice framed the overall legislation as a promise kept, saying that “Our Government received a strong mandate from Canadians to keep our streets and communities safe. We promised to pass the measures contained in our *Safe Streets and Communities Act* within the first 100 sitting days of Parliament and we have delivered.”³¹¹

The court [in *Proulx*] said, however, that it was open for Parliament to introduce such limitations. Unfortunately, sentencing courts have interpreted the availability of conditional sentences in an inconsistent fashion because of the lack of clear parameters, allowing in some instances violent and serious offenders to serve their sentences under a conditional sentence of imprisonment.

This unfortunately has resulted in criticism of the sanction and a loss of public confidence in the administration of justice and, I would submit, in the justice system overall.

³¹⁰ Benedet argues that some of the shorter mandatory minimums introduced by Bill C-10 were intended to block the imposition of conditional sentences; in the context of sexual offences committed against children and youth, the resulting trend has been to replace long conditional sentences by very short terms of imprisonment, often served intermittently. See Benedet, J. (2019). Sentencing for sexual offences against children and youth: Mandatory minimums, proportionality and unintended consequences. *Queen's Law Journal*, 44 (Spring), 284.

³¹¹ The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada, Department of Justice News Release (June 25, 2012) online at: <https://www.canada.ca/en/news/archive/2012/06/government-canada-announces-dates-coming-into-force-key-components-safe-streets-communities-act.html>

The conditional sentencing restrictions took effect in November of 2012. As one trial judge noted, “as a drafting exercise, it would have been more efficient to simply repeal section 742.1 and enumerate the few situations in which a conditional sentence is available.”³¹² The legislative summary describing the changes justified them primarily as being responsive to concerns expressed over their use for serious offences.³¹³

Objections to the restrictions placed on conditional sentencing and the increased use of mandatory minimum sentences³¹⁴ were immediate. The removal of non-custodial options consistent with the principle of restraint were of primary concern, both generally and with regards to Aboriginal offenders as per 718.2(e). Additional concerns included possible conflicts with the fundamental principle of proportionality and an inflexibility that does not allow judges to account for mitigating or exceptional circumstances.³¹⁵

There were neither apparent efforts made to support the restrictive amendments based on an enhanced deterrence argument, nor were there any explanations offered regarding how increased severity would promote public safety. The rhetoric focused on the responsiveness of government in delivering on its law and order mandate, with one member describing Bill C-10 as legislation that would protect the public by “increasing penalties for organized drug crime, and preventing serious criminals from serving their

³¹² Pomerance, *supra* note 3 at p. 310.

³¹³ Parliamentary Information and Research Service. (2012 (revised)). *Legislative summary of Bill C-10* No. 41-1-C10-E). Ottawa, Canada: Library of Parliament:

At the time of their introduction, conditional sentences were generally seen as an appropriate mechanism to divert minor offences and offenders away from the prison system.... In practice, however, [they] are sometimes viewed in a negative light when used in cases of very serious crime (at p. 59).

It has been suggested that a refusal to incarcerate a serious offender can bring the entire conditional sentencing regime, and hence the criminal justice system, into disrepute. In other words, it is not the existence of conditional sentences that is problematic, but rather their use in cases that appear to justify incarceration (at p. 60).

³¹⁴ Parkes identifies 84 MMPs in the *Criminal Code* and 14 in the *CDSA* post Bill C-10. See Parkes, D. (2012). From *Smith* to *Smickle*: The *Charter*'s minimal impact on mandatory minimum sentences. *Supreme Court Law Review* (2d), 57, 149–172. For a review of case law relating to mandatory minimum penalties for drug offences, see MacAlister, D., & Barkase, K. (2018). Mandatory minimum sentencing for drug offences in Canada. *Criminal Law Quarterly*, 66, 161–194. See also *Rangeindr* database online at: <https://mms.watch/>

³¹⁵ See Healy, P. (2013). Sentencing from there to here and from then to now. *Canadian Criminal Law Review*, 17(3); Roberts & Bebbington, *supra* note 304; and Pomerance, *supra* note 3. Much of the opposition to Bill C-10 focused on mandatory minimum sentences. See, generally, Cairns Way, R. (2015). A disappointing silence: Mandatory minimums and substantive equality. *Criminal Reports*, 18(7th), 297; and Vandersteen, L. (2016). Building a safety valve for mandatory minimums: How to construct a statutory exemption scheme. *Criminal Reports*, 27, 249.

sentences in the comfort of their own living rooms by ending house arrest for serious crimes.”³¹⁶

Bill C-10 lacked a principled or coherent strategy, failed to connect initiatives to empirical research, and was unapologetic in its disregard of advice from experts on sentencing policy. Indeed, the legislation can be seen as evidence of the ongoing politicization of crime policy in Canada. It represents a substantive shift towards increased punitiveness and conservatism, with government setting policy based on what it selectively hears from the public and law enforcement agencies, leaving little room for contrary voices, analysis, research, or debate.³¹⁷ In a principled sentencing regime, such significant policy shifts should require more, not less, public education, transparency, and research on (informed) public responses to criminal sanctions.

2.4 The end?: Bill C-10 and the mystery of continued stability in Canada’s imprisonment rates

It is tempting to dismiss the sentencing restrictions introduced by Bill C-10 as political pandering or “penal populism,” which they no doubt were. To those who were paying attention, however, it should not have been surprising. It was not surprising that judges tested the boundaries of their sentencing discretion post *Proulx* and imposed conditional sentences for a variety of serious offences, including manslaughter, sexual assault, and drug trafficking. It was not surprising that the media reported on these cases or that the public and many victim advocacy groups were unable to accept community-based dispositions as terms of imprisonment for serious offences. And so, it was not surprising that a political party exploited this issue, or that they largely succeeded by running on a tough-on-crime platform.

The components of Bill C-10 that relate to conditional sentencing came into effect on November 20, 2012, and applied only to offences committed after that date. The restrictions were important for several reasons. First, as seen through the lens of prison reduction, the restrictions effectively removed the offences that (post *Proulx*) most likely

³¹⁶ Canada, Parliament, House of Commons, Debates, 41st Parl., 1st Sess., Second Reading, September 28, 2011: Mr. Scott Armstrong (Cumberland-Colchester-Musquodoboit Valley, CPC), 1735.

³¹⁷ Webster & Doob, *supra* note 70 at p. 309.

represented actual prison alternatives (not net-widening). In addition, the choice to link eligibility to the maximum sentence available for any given offence resulted in restrictions that were overly broad, no doubt capturing offences that would not have engaged public pushback.³¹⁸ Finally, by drastically reducing judicial discretion without first establishing a principled policy or evidence-based rationale, the restrictions signalled a distrust of the judiciary that was not well received (by judges). This, in turn, may have impacted strict compliance with the restrictions.

The history of conditional sentencing in Canada has been tied to two defining events that are inextricably linked to prison reduction. The first was their introduction in 1996 (via Bill C-41), which was expected to result in a substantial decrease in the use of traditional imprisonment; the second was their selective or partial withdrawal in 2012 (via Bill C-10), which was expected to considerably reduce any decarcerative effects that might be occurring. In other words, imprisonment rates should have started decreasing after 1996, and then increasing after 2012. Any hope of gaining a realistic “warts and all” understanding of conditional sentences, therefore, must start with a frank assessment of these two impacts.

2.4.1 Recent evaluations: Expected and unexpected findings

More than 20 years after their introduction, the critical question remains—*what impact have conditional sentences had on the use of imprisonment in Canada?* Two recent (2019) studies have attempted to answer this question.³¹⁹ In some ways the “gist”

³¹⁸ The restrictions placed on conditional sentencing by Bill C-10 went far beyond the offences specified in the proposal submitted by the group of five provincial Attorneys General in 2003 (see note 297).

³¹⁹ Both studies acknowledge the challenges of conducting this type of research. Webster & Doob point to four fundamental challenges to longitudinal assessments that attempt to empirically assess the impact that the creation of conditional sentences had on the use of other sanctions in Canada: 1) Given that conditional sentences were implemented simultaneously across the country, there are no areas that could act as an effective control group; 2) Conditional sentences came in as part of a legislative package that included other strategies designed to reduce the use of imprisonment (e.g., the introduction of alternative measures for adults, and the codification of the principles of proportionality and restraint); 3) Conditional sentences were introduced shortly after crime rates peaked in 1994; thereafter both overall and violent crime rates in Canada started declining (“crime drop”); and 4) Pre/post analyses assume a stability in sentencing trends that does not exist. Webster & Doob, *supra* note 1 at p. 179.

Similarly, Reid & Roberts acknowledge the limitations of using admissions data from the Adult Correctional Services (ACS) survey. In particular, they highlight that: 1) limited sanction

of their conclusions are telegraphed in the language chosen to frame their efforts; one speaks of a “post-mortem” (suggesting the sanction is already dead), the other of conditional sentences that are an “endangered species” (suggesting a sanction that is at risk of soon being dead).³²⁰ Both efforts address the impacts of conditional sentencing through an exploration of data surrounding their introduction (in 1996) and subsequent restriction (primarily in 2012).

As is the case with so many legislated reforms, these studies report both expected and unexpected outcomes. On the one hand, in terms of the use of imprisonment, both identify an expected reduction following the 1996 reforms, and an expected increase following the 2012 restrictions. Notably, both studies corroborate earlier findings that had failed to find a direct relationship between the number of offenders on conditional sentences and any decreases in the use of imprisonment.³²¹ On the other hand, the studies differ in their assessment of the degree of each change (i.e., effect size) which is, in each instance, unexpectedly low. Put another way, the dramatic changes expected in the wake of both Bill C-41 and Bill C-10 failed to materialize for some reason, suggesting that other forces are at play.

Introducing conditional sentences—disappointing outcomes

While Webster and Doob acknowledge the obvious—that for some offenders the imposition of a conditional sentence was a genuine diversion from what would otherwise have been a custodial sentence³²²—their primary conclusions were that the sanction

categories (sentenced custody [jail], conditional sentence, probation) provide no information about the use of absolute discharges and fines; 2) multiple admissions are likely counted (an offender given a conditional sentence followed by probation who breaches his/her conditional sentence would likely be counted at least once, and possibly more, in each category); and 3) the probation category does not distinguish between probation required as part of a conditional discharge or suspended sentence, and probation attached to another stand-alone sentencing option—e.g., jail, conditional sentence, fine. Reid & Roberts, *supra* note 1 at pp. 10-11.

³²⁰ “Missed opportunities: A post-mortem on Canada’s experience with the conditional sentence,” Webster & Doob, *supra* note 1; “Revisiting the conditional sentence of imprisonment after 20 years: Is community custody now an endangered species?”, Reid & Roberts, *supra* note 1.

³²¹ See, for example, La Prairie, *supra* note 185.

³²² The question is not whether conditional sentences reduced imprisonment at all, but whether they had an “important” impact on incarceration rates, and whether that empirical question can even be answered with available data. The authors point to several competing explanations for any observed reduction in imprisonment rates or counts, including: 1) the pressure to reduce the use of incarceration by any means (e.g., codification of the principle of restraint); 2) declining

was never a “significant tool” for judges,³²³ and that its introduction had no “measurable impact” on the use of imprisonment in Canada.³²⁴ Judges did use the new sanction, though not consistently across provinces/territories, and arguably not to the extent that had been hoped for (with some exceptions).³²⁵ Findings, in BC perhaps more than other provinces, suggest that the sanction’s lack of impact is linked to net-widening. In this province, for instance, 86% of the correctional population was serving a community-based sentence in 1995, prior to the introduction of the conditional sentence order. The percentage of offenders serving a conditional sentence increased from 0% in 1995 to 13.6% in 2005, notwithstanding a net decrease in the overall percentage of offenders serving sentences in the community (from 86.0% in 1995 to 84.2% in 2005).³²⁶

In their analysis of correctional trends from 1996 to 2016, Reid and Roberts (2019) report only slightly more optimistic outcomes.³²⁷ Their findings suggest modest improvements in most, but not all, provinces/territories. Overall, 21 years of conditional sentencing contributed to a 7.65% decrease in the percent of correctional admissions

overall and violent crime rates; 3) instability in prison admission rates; and 4) the growth of remand populations. *Ibid* at pp. 179-181.

³²³ The suggestion that conditional sentences never really caught on in Canada is supported by national court data (2006 to 2015) that estimate conditional sentences represented only 4.2% of sentences (most serious sentence [MSS]) prior to restrictions, and even less (3.6%) after. While the relatively low national rate is disappointing, considerable provincial variations are noted. In BC, for instance, conditional sentences represented 8.9% of sentences prior to restrictions, and 5.8% after (p. 183). Overall, the authors conclude that conditional sentences were never a significant tool for sentencing judges based on findings that the sanction: 1) never represented a large proportion of sentences imposed; and 2) does not appear to have found a stable niche in terms of overall application (by province) or offence type. *Ibid* at pp. 182-183.

³²⁴ In assessing impact, Webster and Doob also reviewed correctional data showing the percentage of offenders serving conditional sentences relative to the percentage of offenders serving a sentence in the community more broadly, theorizing that the introduction of conditional sentencing should have resulted in an increase in the percentage of offenders serving community sentences in 2005. Using correctional data from four provinces (Ontario, Quebec, BC, Alberta) over three time periods: 1995 (prior to CSOs); 2005 (prior to CSO restrictions); and 2015 (post CSO restrictions), Webster and Doob conclude that the introduction of conditional sentencing resulted in an increase in the percentage of offenders serving community sentences in only one province out of four (Alberta). *Ibid* at pp. 190-191.

³²⁵ For example, Webster & Doob note that in 2005 over one-fifth (20.4%) of the correctional population in Quebec was serving a conditional sentence. *Ibid* at p. 190.

³²⁶ *Ibid* at p. 191.

³²⁷ Reid & Roberts, *supra* note 1. Note: Analyses did not include Alberta, Northwest Territories, or Nunavut.

that result in a custodial sentence (jail).³²⁸ There was considerable variation across provinces, with Saskatchewan being the most positively impacted (14.23% reduction), and the two largest jurisdictions experiencing more modest effects (Ontario saw a -7.13% CSI impact on custody and a -5.45% net-narrowing effect while Quebec witnessed impacts of -10.37% and -23.88% respectively).

Notably, the findings of this study confirm the disappointing performance of conditional sentences in BC, as first suggested by Webster and Doob.³²⁹ Reid and Roberts report a -3.7% decarceration effect for BC in 1996; after which only 2009 had more than a -1% change. In one-third (7/21) of the years reviewed, decarceration effects were mitigated by custodial increases. Overall, the introduction of conditional sentences contributed to a .65% increase (not decrease) in the use of custody. In what can only be described as an unintended (and unexpected) consequence, Reid and Roberts note that admissions to prison over the 21-year period expanded by almost 15% in BC:

In other words, not only was the CSI found to have contributed to an increase in custody [in BC] during the 21-year period but there was also evidence that a large proportion of cases that would have previously received a probation order were admitted to either custody or a CSI.³³⁰

And so, it becomes clear that the application of conditional sentencing, not only in terms of how often it was used, but also in what (offence/offender) circumstances, is key to understanding its failure as a tool of prison reduction.

Restricting conditional sentences—unforeseen outcomes

As expected, both studies point to a substantially reduced role for conditional sentences since 2012. Reid and Roberts observe that three of the last four years (2014-2016) are among the worst performing years for the conditional sentence in their year-over-year analyses.³³¹ Webster and Doob identify similar impacts, noting that the restrictions appear to have had the greatest effect in Quebec, a province in which the

³²⁸ The authors also note a -5.4% “narrowing of the net” (reduction in the overall use of imprisonment). “Narrowing of the net” occurs if a proportion of the caseload that otherwise would have received custody or a CSI is given the less severe option of probation. *Ibid* at p. 15. Note: Reid & Roberts use the acronym CSI (conditional sentence of imprisonment).

³²⁹ *Ibid* at p. 22.

³³⁰ *Ibid* at p. 27.

³³¹ *Ibid* at p. 29.

proportion of offenders serving conditional sentences between 2005 and 2015 dropped from 20.4% to 10.5% (though the proportion serving community sentences only dropped by 4.4%). In BC, the restrictions decreased the proportion of offenders serving conditional sentences from 13.6% to 8.0% (a 5.6% drop between 2005 and 2015), while the proportion of offenders serving community sentences only dropped by 2.1%.³³² Notably, however, overall imprisonment rates have remained largely stable, despite the fact that fewer conditional sentences have been imposed.³³³

Summary

When conditional sentences were introduced, we expected to see their use matched by a corresponding reduction in the use of prison. In light of that common sense expectation, the observed overall effects of conditional sentences have been disappointing, notwithstanding the considerable variation that is evident across provinces/territories. At best, we can say that there were modest successes over certain time periods, in some provinces. Similarly, when restrictions were introduced in 2012, we expected to see both a drop in the use of conditional sentences, and a corresponding increase in the use of prison.³³⁴ The fact that we see the former, but not the latter, suggests that other factors are at play, in some, but not all, provinces/territories. Reid and Roberts argue that the variation across provinces/territories suggests that the sanction has the potential to reduce prison admissions more significantly (and

³³² Webster & Doob, *supra* note 1 at pp. 190-191. Another notable finding arose from a detailed review of Ontario data, which identified decreases in the proportionate use of conditional sentences in four out of the five offence categories. Indeed, the use of conditional sentences overall dropped, as expected, from 5.7% in 2011 to 4.2% in 2015. Unexpectedly though, the use of custody also dropped, from 35.7% in 2011 to 34.8% in 2015 (at p. 185). When offences were broken down by category, the only substantial effect was observed with drug offences. In 2011 (pre-C-10), 25.7% of drug offences resulted in jail terms, and 26.8% resulted in conditional sentences. In 2015 (post C-10), the imposition of jail increased only slightly, to 29.1%, while the use of conditional sentences dropped dramatically, representing only 8.9% of outcomes that year (at p. 185).

³³³ Webster & Doob, *supra* note 40 at p. 360.

³³⁴ It should be noted that there were many elements of Bill C-10 that were expected to increase the use of custody—e.g., more mandatory minimum prison terms. While not specifically addressed in this project, it is possible that the explanations for stability (in the imprisonment rate) may apply equally to these groups.

consistently) than it has. The key question then becomes why—why did conditional sentences appear to succeed in some provinces/territories, but fail in others?³³⁵

2.4.2 A way forward: Other ways of gaining knowledge

The findings outlined above are perplexing and suggest that the impact of conditional sentences may be considerably more complex than originally thought. Certainly, these outcomes raise as many questions as they answer. At the front-end, it would be helpful to understand the processes or rationales that are associated with the imposition of conditional sentences in cases in which the offender is not otherwise facing a prison term (net-widening). Surely judges do not intentionally undermine the intent of the legislation, so what need is being met by a conditional sentence that could not be met by some other non-custodial sentencing option? In other words, what are judges telling us through their decisions?

The judicial response to the restrictions introduced in 2012 is also provocative. If conditional sentences are no longer being imposed for serious offences, but we do not see a corresponding increase in the imprisonment rate, what does that mean? While it intuitively makes sense to substitute one non-custodial option with another, the construction of conditional sentences as an alternate form of imprisonment makes that problematic. When imposing a conditional sentence, a judge declares that imprisonment is both necessary and consistent with the principles and purposes of sentencing. Can the fact that a conditional sentence is no longer available for a specific offence mean that imprisonment is no longer necessary? If so, was it ever?

It is worth noting that the historical (pre Bill C-10) use of conditional sentences in place of other non-custodial options (net-widening) may have created a new dilemma for sentencing judges post Bill C-10. That is, such practices of net-widening can have the effect of “up-tariffing” or shifting the sentencing range for a given offence upwards, to something more punitive than it otherwise would have been.³³⁶ In such cases, do judges now imprison offenders who they otherwise would have placed on a conditional sentence? Or do they use a non-custodial sanction (e.g., probation) that now appears

³³⁵ Reid & Roberts, *supra* note 1 at p. 30.

³³⁶ Webster & Doob, *supra* note 1 at p. 195.

overly lenient, given that the sentences for the offence have been up-tariffed to prison terms through the use of conditional sentences of *imprisonment* while they were available? Webster and Doob (2019) frame it this way: “while introducing a new sanction into the mix of community sanctions may not have reduced imprisonment, taking it away may have increased incarceration.”³³⁷

Until now, empirical studies on conditional sentencing have focused primarily on quantitative analyses in which the emphasis has been, for example, on counting how often each sanction is used or how many offenders are imprisoned. While clearly valuable in giving a broad picture of the correctional reality as impacted by conditional sentences, this type of research is largely unable to capture the day-to-day lived experiences of those “on the ground.” In particular, it would seem fundamental—for those interested in better understanding the impact of conditional sentences on imprisonment rates—to include the voice of judges, the most immediate gatekeepers of this sentencing option. While the national survey of judges conducted in 1998 provided valuable insights, with notable exceptions³³⁸ little-to-no recent attention has been given to following up with this group of decision-makers—e.g., exploring how judges have understood and used conditional sentences over time. What is needed now is a more nuanced and comprehensive examination of sentencing, especially in light of the unexpected findings identified above. More detailed micro data—both quantitative and qualitative—are needed to begin to unravel the many mysteries of conditional sentencing.

Given the striking inter-provincial variability noted, a methodologist would immediately recognize the unique research opportunities inherent in interjurisdictional differences. Perhaps most notably, it would be particularly interesting to explore conditional sentencing in a province that is seen either as an unqualified success in terms of utilizing conditional sentences to achieve prison reduction, or an unmitigated failure as an effective means of better identifying (and understanding) the principal contributing factors. Given that both studies assessed British Columbia as having most clearly failed in its use of conditional sentences (as mechanisms for prison reduction),

³³⁷ Webster & Doob, *supra* note 1 at p. 194.

³³⁸ For example, Stephens, *supra* note 161. See also Stephens, M. (2006). *Lessons from the front lines in Canada’s restorative justice experiment: The experience of sentencing judges* [LLM]. Columbia Law School.

gaining a more in-depth understanding of what happened in this province would appear to be a good start to understanding the performance of the sanction more broadly. After all, conditional sentences still exist and are still being used. More importantly, given the recent decision of the Ontario Court of Appeal in *Sharma*,³³⁹ they may be more at a crossroads now than they have ever been.

³³⁹ *Sharma*, *supra* note 4. Leave to appeal granted January 14, 2021 (SCC Docket #39346).

3 Methodology

Conditional sentences were introduced specifically to reduce the use of incarceration in Canada. Notably, recent evaluations suggest that, at best, the sanction has been modestly effective for a short time in some provinces/territories, and completely ineffective in others, including British Columbia. This study seeks to understand why a sanction that should have resulted in meaningful prison reduction, did not. What were the mechanisms of failure—and how can they (or should they) inform sentencing policy moving forward? More importantly given recent case law, is there a future for conditional sentencing in Canada? If there is, what should it look like and what could be done to improve its performance as a decarcerative strategy? If there is not, are there other reforms that should be considered to promote the use of non-custodial options?

3.1 Research design

This study employs a mixed-methods approach to explore conditional sentencing. The research design incorporates three data sources, including detailed court sentencing data, as well as a survey and interviews with Provincial Court judges. While the original design envisioned a sequential progression through the various sources, there was ultimately considerable overlap in terms of both data collection and analysis. The decision to employ both quantitative and qualitative methods was informed by three considerations. First, it was important to get a sense of how judges in BC had been using conditional sentences—e.g., how often they were imposed and for which offences. There was also an interest in developing a more in-depth understanding of the sanction through the analysis of increasingly detailed quantitative data—e.g., sentence length and combinations, responses to breaches, optional conditions imposed, etc.

The second consideration recognizes that we cannot hope to understand the complexities of a sanction simply by counting how many times it has been used. Especially by incorporating the views of trial court judges (through a survey and interviews), this project offers a richer and more contextualized understanding of how

conditional sentences have been applied over time.³⁴⁰ After all, decisions about the use of any sanction are made by judges, not by law-makers; any opportunity to better understand the assumptions and beliefs underlying this practice should be explored. This is especially important given the traditional lack of criminological research incorporating judicial interview data—almost certainly a reflection of the general reluctance of judges in Canada to express their personal views on sentencing issues and/or policy.³⁴¹

Finally, an anticipated benefit of incorporating the perspective of trial court judges, especially through the interviews, was that doing so may act to bridge the divide that exists between academia and the legal world. To that end, efforts were made throughout the project to consult informally with a variety of criminal justice participants (e.g., prosecutors, defence counsel, administrators). This included, for instance, seeking broad input on this project to ensure that its focus held “real-world” value and was both interesting and relevant to practitioners. This approach is consistent with the “lessons for scholars” that have guided much of this research project: “if you want to be heard, learn to listen; if you want to be heard, answer real problems; if you want your answers to be followed, make them realistic.”³⁴²

Research setting

The decision to focus on one province (BC) was informed by both strategic and pragmatic considerations. First, as noted earlier, BC appears to have had the least success (or, inversely, greatest failure) in using conditional sentences as tools of prison reduction. As such, the province offers unique opportunities to those seeking to identify and better understand the factors that have produced this unintended result. Indeed, we would expect such mechanisms of failure to be much more apparent in a province that

³⁴⁰ Trahan, A., & Stewart, D. M. (2013). Toward a Pragmatic Framework for Mixed-Methods Research in Criminal Justice and Criminology. *Applied Psychology in Criminal Justice*, 9(1), at p.63. On the overall benefits of a mixed methods approach see Maruna, S. (2010). Mixed Method Research in Criminology: Why Not Go Both Ways? In A. R. Piquero & D. Weisburd (Eds.), *Handbook of Quantitative Criminology* (pp. 123–140). New York, NY: Springer New York.

³⁴¹ Doob & Webster, *supra* note 80(a) at p. 354.

³⁴² Miller, M. L., & Chanenson, S. L. (2009). Shaping Modern Sentencing: Three Giants. *Federal Sentencing Reporter*, 21, 227–234, at p. 229.

saw no sustained decreases in the use of imprisonment, as opposed to one that experienced even modest success.

The second reason for focusing on a single province was that doing so allowed for a more meaningful, in-depth analysis of multiple data sources. Put another way, given the choice between a more superficial review of sentencing practices in several provinces, or a deeper dive into a single province employing multiple measures, the preference was for the latter. The goal was not to replicate other empirical studies that have examined the use of conditional sentences but, rather, to extend their findings by offering (at least partial) explanations for the overall patterns they identify. Finally, practical considerations, including my familiarity with BC processes and justice system personnel, as well as physical proximity to British Columbia's highest volume courthouses (which facilitated in-person interviews), favoured the selection of this province over other Canadian jurisdictions.

In terms of defining methodological approaches, this project is largely descriptive in nature. Further, it would loosely fit within the category of a non-experimental design in the sense that it does not include the explicit or direct manipulation of variables, nor does it include the random assignment of participants. The quantitative element, involving the collection and analysis of court data, was largely inductive. The original intention was to cast as broad a net as possible, using a longitudinal design and asking essentially "how have judges in BC used conditional sentences and how has that changed over the years, particularly in light of subsequent legislative and judicial decisions?"

While this broad research question resulted in the collection of a large amount of material, it also allowed for the exploration of multiple interests as the research focus was progressively narrowed. As is often the case, the data existed as answers awaiting the formation of questions. That changed with the serendipitous publication in 2019 of the two studies that assessed the impact of conditional sentencing on the use of imprisonment in Canada, and the disappointing results noted for BC.³⁴³ Indeed, at that point the research question materialized so quickly that it was as if it had been waiting

³⁴³ Webster & Doob, *supra* note 1; Reid & Roberts, *supra* note 1.

there all along. That is, why did the introduction (and use) of an explicit prison alternative not result in meaningful reductions in imprisonment rates nationally and provincially?

3.2 Data sources

3.2.1 Adult court sentencing data (BC) – sentences – breaches – conditions

Up until this point, conditional sentences have generally been discussed in terms of their impact either on sentenced admissions to prison, or on imprisonment rates overall. These have been appropriate metrics given the initial broad focus on sentencing policy as viewed through the lenses of imprisonment and restraint. Indeed, Webster and Doob (2020) suggest that imprisonment rates are the most relevant metric when assessing the impact of reforms intended to reduce the use of incarceration. The primary rationale for using imprisonment rates rather than sentencing-based measures in such instances is that doing so acknowledges the fact that we are unable to disentangle the use of pretrial detention (remand) from the sentencing decisions reflected in court and corrections data.³⁴⁴

For our current purposes, however, we shift from the macro to the micro, concerned less with the broad impacts of sentencing *writ large*, and more with the detailed, case specific decisions made by individual judges. The shift in focus requires a corresponding shift in data. Accordingly, instead of calculating imprisonment rates (or using correctional counts), sentencing patterns will be determined through the analysis of micro-level data provided by BC courts, the most direct reflection of judicial decision-making.

Quantitative data for this project were drawn from the JUSTIN database, an information management system maintained by the Court Services Branch (CSB) under the direction of the judiciary.³⁴⁵ The decision to create a unique database was informed by the particular needs of this project and the realization that existing data publicly

³⁴⁴ Webster & Doob, *supra* note 40 at pp. 342-45.

³⁴⁵ Source: Court Services Branch (Victoria, B.C.) Strategic Information and Business Applications (SIBA), Criminal Business Information database. All data relate to adult files concluded in either the Provincial Court or Supreme Court during the specified calendar year.

available through CCJS³⁴⁶ would not provide the necessary detail.³⁴⁷ These included an interest in exploring sentence patterns of specific offences not captured in the standard CCJS aggregated groupings, the use of suspended sentences, changes in sentence length or combinations, the incidence of (and response to) breaches, and the use of optional conditions, over time.

Given the complexity of sentence decision-making and the organization of these data, three separate requests were made and satisfied (see Table 3-1).³⁴⁸

Table 3-1 Description of BC court datasets (3)

Dataset	Years	Description
1 – single charge cases	2006 to 2017	All adult single charge cases dealing with federal offences (CCC, CDSA) sentenced in criminal courts (BC)*
2 – CSO breaches	2011 to 2016	All conditional sentences (CCC, CDSA) that include a CSO breach allegation
3 – CSO & SS conditions	2011 & 2017	All conditions imposed on conditional and suspended sentences for drug trafficking offences (5(1) & (2) CDSA)

*Not including offences relating to impaired driving³⁴⁹

³⁴⁶ The Canadian Centre for Justice Statistics (CCJS) provides court and corrections data for Juristat publications and tables available via Statistics Canada (CANSIM).

³⁴⁷ This is consistent with other recent research that has relied upon JUSTIN/CSB data due to the inability of CCJS data to provide information regarding conditions and breaches. See Sylvestre, M.-E., Blomley, N., Damon, W., & Bellot, C. (2017). *Red zones and Other Spatial Conditions of Release Imposed on Marginalized People in Vancouver*. While much of the JUSTIN/CSB data would be similar to that which is supplied to CCJS (e.g., the sentence outcome data), it is organized differently.

Deficiencies in the Integrated Criminal Court Survey (ICCS) include the following: data that are reported by broad offence categories only (e.g., ‘theft’ without the ability to break it down into ‘theft under’ and ‘theft over \$5,000’); no information regarding the use of suspended sentences or discharges (currently coded as “other”); no detail provided regarding exact sentence length or the practice of combining sanctions (e.g., prison plus probation); no reporting on CSO breaches in terms of incidence and judicial response; and a lack of information regarding optional conditions imposed on conditional and suspended sentences.

³⁴⁸ The time period for each dataset reflects the following considerations: 1) the availability of accurate and reliable data; 2) an interest in minimizing requests to allow for timely processing and analysis; and 3) rational linkages to the research questions being addressed.

³⁴⁹ Early analysis uncovered a distortion in sentencing patterns that coincided with the introduction of immediate roadside prohibitions (IRPs) in BC in 2010, and the drastic drop in charges of impaired driving that followed.

Impaired driving charges represented 11.5% of all sentenced charges concluded in 2006; this dropped to 9.9% in 2011 and to 2.8% by 2014. The most common sentence (85-90%) for

The ability to isolate suspended sentences and compare their use (to that of conditional sentences) was critical given that no other report had attempted to do so. After all, if suspended sentences are the outcomes most vulnerable to net-widening, it is crucial to know whether their use went down with the introduction of conditional sentencing, or up with the restrictions imposed by Bill C-10. The database created for this study allows for such analyses, especially given the more recent concerns that post Bill C-10 judges may be using suspended sentences in place of conditional sentences, at least in some cases.

There are additional advantages to having disaggregated data (as opposed to receiving summarized reports). These include providing the ability to:

- Validate outcomes or explore anomalies at the case level.³⁵⁰
- Ensure that sentencing trends involving specific offences are limited to instances in which offenders were sentenced on the offence charged (e.g., trends on drug trafficking do not include cases in which the charge was trafficking, but the plea was entered to simple possession).
- Conduct more detailed coding of offences (e.g., theft under \$5,000 was coded separately from theft over \$5,000, instead of the single “theft” offence coded by CCJS).³⁵¹

offences related to impaired driving was a fine (note: between 2006 and 2010, 21.7% of such charges resulted in a sentence imposed for a lesser offence under the *Motor Vehicle Act*).

A decision was made to remove impaired driving related charges so that extreme fluctuations in the use of fines (rooted in the administrative change in the sentencing for this offence) would not impact calculations of relative sanction use over time. This included charges under s. 253(a) impaired driving, s. 253(b) driving ‘over .08’, and s. 254 refusing to provide a breath sample.

³⁵⁰ For example, the original dataset included 498 charges in which the outcome was a suspended sentence with probation, in addition to either a small fine or a one-day jail term. Given that these combinations are not lawful (for instance, you cannot suspend sentence and impose sentence at the same time; see *R. v. Polywjanyj* (1982), 1 C.C.C. (3d) 161 (Ont. C.A.)), queries were made through Court Services. The most likely explanation was that victim surcharges were being erroneously entered as fines. This was supported by the fact that the fines were low (\$50 or \$100), and no mandatory surcharge was entered on these files (as required). For files showing suspended sentences, probation, and jail, the jail terms on those files that were checked were for one-day and the victim surcharge was payable forthwith. This suggests that the jail term represented default time for the victim surcharge (on one-day terms, the offender is not physically taken into custody). In such cases the fine or jail term was removed.

Another issue involved sentences of “time served” (only) or “jail zero days”; these were reviewed and updated to one-day jail sentences in light of case law that confirms that a sentence cannot be discharged before it is imposed. See *R. v. Lea*, 2010 MBCA 37, at para 26.

³⁵¹ This allowed for the identification of specific offences impacted by the Bill C-41 restrictions on conditional sentencing.

Concerns regarding the validity of this newly created dataset were largely addressed through an exercise that compared specific outcomes to those obtained when the same query was run through the CANSIM portal of CCJS.³⁵² Though not strictly comparable, results for the three matched sanctions (jail, conditional sentences, fines) suggest considerable consistency in terms of overall counts. The overlay for fines is particularly consistent—e.g., dataset 1 (this project) recorded 1005 fines imposed on single charge cases in the 2016 calendar year, while a matched CANSIM dataset recorded 1019 in the 2016/2017 fiscal calendar year (see Appendix C for comparisons). These results suggest that dataset 1 is counting the same number of cases as are being counted through the CANSIM portal of CCJS.

3.2.1.1 Sentence outcomes - dataset 1 – single charge cases

Dataset 1 is the largest dataset received. It originally provided file level data relating to all 486,087 sentenced charges on adult criminal files concluded in BC Provincial Court or BC Supreme Court between January 1, 2006 and Dec 31, 2017 (inclusive).³⁵³ This included all (88) court locations and all offences under either the *Criminal Code of Canada* or the *Controlled Drugs and Substances Act*.³⁵⁴ The value of dataset 1 was twofold. First, it provided a broad sense of the general usage of conditional sentences, relative to other sanctions, over a lengthy period (11 years). Second, and more critically, it allowed for the exploration of sentencing patterns for specific offences, both before and after the restrictions brought in by Bill C-10.

³⁵² To validate the single charge dataset (1), a relatively comparable dataset was created through the manipulation of preferences in the ICCS database available through Statistics Canada (CANSIM)—see below. See Statistics Canada. Table 35-10-0030-01 (formerly CANSIM 252-0056) “Adult criminal courts, guilty cases by type of sentence.” MSO & MSS; preferences were set to select only cases that met the following criteria: 2005/06 to 2016/17; BC; single guilty finding; statutes - CC (without traffic), CC traffic (without impaired), CDSA drug possession, CDSA other drug offences. <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003001>

³⁵³ The term “file level” refers to raw data (e.g., file number, count number, offender ID, charge section, sentence codes, etc.) and is used to distinguish the dataset from one populated by data compiled and summarized by another agency. It should be noted that data are organized by calendar year and are therefore not directly comparable with data that are reported on a fiscal year basis—a characteristic of CCJS datasets.

³⁵⁴ These inclusion criteria are consistent with other sentencing research conducted in Canada, which generally focuses on CCC and CDSA offences, notwithstanding the fact that it also reports on “other” federal statutes. Cases relating to youth were not requested given the different sentencing regime governing this population.

The initial dataset was subsequently reduced to include only single charge cases for two related reasons. First, given that conditional sentencing restrictions applied only to more serious offences, assessing the impact of the restrictions required the analysis of sentence trends over time as they relate to those specific offences only. This would not be possible with cases involving multiple charges as there would be no way of knowing which parts of the sentence relate to which charge. Second, there was also an interest in isolating specific sentences (e.g., “long” conditional sentences) and then, working backwards, identifying their associated offence. Again, this would not be possible when sentences covered multiple offences. This methodological challenge was resolved through the removal of sentences imposed on multiple charges. Accordingly, the dataset was reduced to include only the 169,456 single charge cases.³⁵⁵ This strategy (of including only single charge cases) is consistent with the approach adopted by other researchers interested in exploring sentencing patterns for specific offences.³⁵⁶

Proposing a different approach – primary sentences and probation

Traditionally, sentencing research has relied upon court data accessible via Statistics Canada (CCJS/ICCS) and has been limited by that agency’s recording and reporting decisions. The ICCS, for instance, offers six possible sentence categories: custody (jail); conditional sentence; probation; fine; restitution; and other.³⁵⁷ Reports by

³⁵⁵ The practice of imposing “global” sentences covering multiple charges has decreased as a result of jurisprudence that encourages judges to impose a sentence for each count – see, for instance, *R. v. Taylor*, 2010, MBCA 103 at para 10; *R. v. Ivanic*, 2011 BCCA, 158 at para 9; *R. v. Lavellee*, 2011 BCCA 531 at para 34; and *R. v. Hanna*, 2013 ABCA 134 at para 5.

Sentences on lesser or included offences were also excluded. For charges of aggravated assault, the overall “guilty/lesser” rate was 30.3%; for charges of theft over \$5,000, 6.5%; and for drug trafficking, 11.1%. All cases in which the sentence was imposed on a lesser charge (n=8,217) were excluded to ensure that they would not be captured when analyzing sentence trends for the more serious “parent” offences. Doing so ensured that the sentencing pattern discerned for each of these “serious” offences was not compromised or contaminated by the inclusion of sentences imposed on the lesser (summary) offences.

³⁵⁶ See, for instance, Roberts, J. V., & Birkenmayer, A. (1997). Sentencing in Canada: Recent statistical trends. *Canadian Journal of Criminology*, 39(4), 459–482; Marinos, *supra* note 58; Reid, A. A. (2014). Revisiting Leniency: An Intra-Provincial Study of Sentencing Variation in British Columbia. *Canadian Criminal Law Review*, 18(1), 39–56; Reid, A. A., & MacAlister, D. (2018). Extending a Geographical Perspective to the Study of Jurisdictional Consistency in Sentencing Outcomes. *The British Journal of Criminology*, 58(5), 1147–1170.

³⁵⁷ The “other” category includes discharges, suspended sentences, community service orders, and prohibition orders, amongst others. Source: Statistics Canada. ICCS – sentence classification & definition:

type of sentence³⁵⁸ count multiple sentence outcomes against a single most serious offence (MSO); reports by most serious sentence³⁵⁹ count only the most serious sentence (MSS) against the MSO based on the following ranking: custody (jail); conditional sentence; probation; fine; and other (restitution, absolute or conditional discharge, suspended sentence, other). While both methods provide information regarding select sanction usage, both arguably misrepresent sentence decision-making by treating (and counting) probation as a sentence instead of as a sanction attached to a sentencing decision.

Treating probation as a sentence can distort our understanding of outcomes by over-emphasizing its use and/or misrepresenting its meaning. In terms of the first concern, given that probation is necessarily attached to a conditional discharge or a suspended sentence, and often attached to other sentences (prison, conditional sentence, fine), reports that count multiple sentence outcomes can give a misleading impression of sentencing patterns.³⁶⁰ For instance, probation is consistently referenced in some reports as the most frequent sentence type—e.g., accounting for approximately 44% of guilty cases in 2016/2017.³⁶¹ It would be misleading to suggest that in 44% of all guilty cases, the judge decided that the fit and proportionate sentence was probation. It would be more appropriate to say that of all sentences imposed in 2016/2017, 44% included probation.

Indeed, knowing that an offender was placed on probation is not particularly helpful if what you are interested in is the decision made on sentence. If I were to tell someone interested in sentencing decisions that the most common sentence for offence X was probation and that it accounts for 60% of sanctions imposed for this offence, I am

<http://www23.statcan.gc.ca/imdb/p3VD.pl?Function=getVD&TVD=413945&CVD=413945&CLV=0&MLV=1&D=1>

³⁵⁸ Statistics Canada. Table 35-10-0030-01 (formerly CANSIM 252-0056) Adult criminal courts, guilty cases by type of sentence; DOI: <https://doi.org/10.25318/3510003001-eng>

³⁵⁹ Statistics Canada. Table 35-10-0031-01 (formerly CANSIM 252-0057) Adult criminal courts, guilty cases by most serious sentence; DOI: <https://doi.org/10.25318/3510003101-eng>

³⁶⁰ Reports that focus on the most serious sentence (only) are less likely to distort the use of probation by over-emphasizing its use, though they still do so to a limited extent by virtue of the sanction rankings, which count suspended sentences, conditional discharges, and fines with probation—all as probation.

³⁶¹ Statistics Canada. (2019). *Adult Criminal and Youth Court Statistics in Canada, 2016/2017*, by Zoran Miladinovic, in Juristat: No. 85-002–X. (Ottawa: Statistics Canada), at p. 8.

not saying much. If, however, I tell this same person that the sentencing pattern for offence X suggests that prison, conditional sentences, and suspended sentences each account for 30% of the outcomes, and that overall, 60% of these sentences include probation, I am providing more useful information.³⁶²

In this way, treating probation as a secondary sanction recognizes its status. As Edgar (1999) notes “[p]robation cannot be used as a stand-alone tool; it must be accompanied by a conditional discharge, suspended sentence, fine, or imprisonment.”³⁶³ References in the literature to probation being imposed “on its own”³⁶⁴ presumably refer to one of the first two situations (conditional discharge or suspended sentence), in which the probation order is, in effect, the only tangible outcome or practical consequence.

It is the second form of distortion—misrepresentation—that is problematic for the current project. Even if only the MSS is used, collapsing three distinct sentence outcomes into a single category of “probation” misrepresents (or fails to accurately represent) the meaning of each. A conditional discharge is not the same as a suspended sentence, and neither of them is the same as a fine with probation. For the purposes of this project, these nuances matter. Not only was there an interest in accurately reporting the relative use of each sentencing option, but there was also a desire to speak more authoritatively on changes in the use of suspended sentences. This required more detail than is generally available.

Accordingly, the operationalization of “sentence” for this project differs from that traditionally used by researchers. The focus is on the decision made by the judge at the conclusion of the sentence hearing, recognizing that we currently do not have a stand-

³⁶² Ideally, I would also be able to speak to sentence lengths and combinations for prison and conditional sentences (i.e., how long they are and whether they are combined with probation), as well as something about the optional conditions imposed on the conditional and suspended sentences.

³⁶³ Edgar, A. (1999). Sentencing options in Canada. In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (pp. 112–136). University of Toronto Press, at p. 122. See also the decision of the Quebec Court of Appeal - *F.J. c. R.*, [2007] No. 3027 – “From a simple reading of section 731, it is clear that a probation order is not a sentencing alternative to be ordered on a stand-alone basis; rather, it is authorized only in addition to a suspended sentence or some other punishment” (at para 83).

³⁶⁴ See, for instance, Manson, et al., *supra* note 176 at p. 325.

alone probation order for adults (as we do for youths).³⁶⁵ First, the term “primary sentence” is used to identify the following six options: jail, conditional sentence, fine, suspended sentence, conditional discharge, and absolute discharge. Second, probation is counted but treated as a secondary or attached sanction. This distinction avoids any potential distortion that may result from its treatment as a sentence. Probation is not ignored; it is simply put in its place. Finally, collateral orders that arise from legislation (e.g., restitution or prohibitions) are not counted, notwithstanding the fact that they can impose significant obligations or restrictions on an offender.³⁶⁶

Tracking the primary sentence allows for an assessment of the use of all possible outcomes over time, including the quantification of the various sentence combinations (see Table 3-2).³⁶⁷

Table 3-2 JUSTIN codes – primary sentence and coding options

RESULT CODE	DESCRIPTION	Coding options
J	jail	alone or with probation (optional)*
CS	conditional sentence	alone or with probation (optional)
F	fine	alone or with probation (optional)
SS	suspended sentence	with probation (mandatory)
CND	conditional discharge	with probation (mandatory)
ABD	absolute discharge	

* Combinations of ‘jail plus fine’ and ‘jail plus fine and probation’ were counted but not included. In addition to being rare, the primary interest was in the use of probation as a secondary sanction, not fines.

³⁶⁵ The *Youth Criminal Justice Act* contemplates the imposition of probation with or without any other sanction (s. 42(2)(k) YCJA).

In addition, treating probation as a meaningful sentence category ignores the fact that probation orders are imposed for all sorts of reasons—for instance, to facilitate rehabilitation, to protect a victim, to ensure compliance with positive obligations, and are not intended to reflect a proportionate response. Notably in *Proulx*, Lamer, C.J. quoted approvingly from a 1997 decision of the Saskatchewan Court of Appeal on that issue, noting that “[probation] seeks to secure “the good conduct” of the offender and to deter him from committing the same or other offences. It does not particularly seek to reflect the seriousness of the offence or the offender’s degree of culpability.” *Proulx*, *supra* note 14 at para 32 – quoting Bayda, C.J.S. in *R. v. Taylor* (1997), 122 C.C.C. (3d) 376 at p. 394.

³⁶⁶ For a discussion of collateral orders see Manson et al., *supra* note 176 (Ch.13). The decision to exclude collateral orders was informed by two primary considerations. The first was an interest in simplifying the analysis of sentencing data by focusing on the primary sentence, with or without probation; the second reflected a desire to prioritize judicial sentencing decisions in which judges exercised some discretion, and the recognition that many collateral orders were mandatory (e.g., victim fine surcharge, offence-related prohibitions, etc.).

³⁶⁷ Suspended sentences and discharges are included, notwithstanding the fact that they quite literally are not sentences. Their inclusion is consistent with the general practice in sentencing research and the recognition that these responses are generally treated as final outcomes.

The decision to focus on the primary sentence and sentence combinations allowed for a more accurate calibration of the relative use of the various sanctions over time. Doing so also facilitated comparisons of sentencing patterns on specific offences over time (e.g., pre/post Bill C-10 restrictions).³⁶⁸ Finally, tracking primary sentences (as listed above) limited the need to rank sanctions relative to each other. This provided more room for detailed queries. For example, one might query what the relative distribution, by count and percentage, was of primary sentences for each identified offence over time (by calendar year). Where this query exposed a discontinuity in sentencing patterns pre/post Bill C-10, a more detailed follow-up might examine sentence lengths (for jail and conditional sentences), or sentence combinations (jail or conditional sentences followed by probation), over time.

3.2.1.2 CSO breaches - dataset 2

Much of the conditional sentencing literature and jurisprudence has highlighted the importance of the sanction's breach provisions. Indeed, their facilitated processes and lower standard of proof were referenced in *Proulx* as factors that emphasized the punitive nature of conditional sentences and served to distinguish them from suspended sentences. Notably, the Court went so far as to create a presumption of incarceration (for the remainder of the term) in cases in which an offender breached a condition without a reasonable excuse. Specifically, "[t]his constant threat of incarceration will help to ensure that the offender complies with the conditions imposed...it also assists in distinguishing the conditional sentence from probation by making the consequences of a breach of condition more severe."³⁶⁹

Given their importance, it is critical that we understand how judges are responding to proven breaches on conditional sentences. Since section 742.6 provides for both custodial and non-custodial responses, we cannot simply assume that offenders

³⁶⁸ There was an interest in finding out how sentencing patterns changed once an offence was no longer eligible for a conditional sentence. If what would have otherwise been a conditional sentence pre Bill C-10 became a traditional jail term post Bill C-10, this change would suggest that conditional sentences for that offence has likely been used as prison alternatives. If, on the other hand, they became suspended sentences with probation (or short jail terms with probation), this change might suggest that conditional sentences pre Bill C-10 were being used in place of more lenient options (net-widening).

³⁶⁹ *Proulx*, *supra* note 14 at para 39.

are facing harsh (or any) consequences for non-compliance.³⁷⁰ Notwithstanding the importance of the breach provisions in terms of the value and impact of conditional sentences, this is an under-studied area. Notably, this project addresses this gap by reporting on the proportion of orders alleged to have been breached, as well as on the judicial response to proven breaches. Given the focus of this project, knowledge in these areas is critical for two reasons. On the one hand, a high breach rate followed by a high termination rate may explain the sanction's lack of success as a tool for prison reduction. The sanction is applied appropriately; the issue is non-compliance. On the other hand, to the extent that responses to proven breaches are non-custodial, that outcome could be taken as support for the existence of net-widening (also relevant to failed prison reduction). Indeed, if an offender is not incarcerated for having breached a conditional sentence, it is more difficult to argue that this conditional sentence represented a true diversion from prison in the first place.³⁷¹

The breach dataset (2) contained three layers of integrated information, identifying all conditional sentences imposed between 2011 and 2016, and flagging all instances in which a breach allegation had been initiated.³⁷² This captured 14,658 conditional sentences, 5,336 of which had breach allegations attached. Notably, this dataset provided information regarding the judicial response recorded against proven breaches (n=4,994). The outcome codes used reflected the four options judges have under s. 742.6(9) when dealing with an admitted or proven conditional sentence breach (see Table 3-3).³⁷³

³⁷⁰ Section 742.6 provides four options upon proven breach. The judge can: 1) order that the original sentence applies; 2) change the optional conditions attached to the conditional sentence; 3) suspend the conditional sentence and have the offender serve a portion of the remaining term in custody; or 4) terminate the conditional sentence and have the offender serve the balance of the term in custody.

³⁷¹ While the fact that s.742.6 provides for non-custodial responses might suggest otherwise, the Court in *Proulx* was clear in its guidance on this issue. Specifically, it suggested that “where an offender breaches a condition without reasonable excuse, there should be a presumption that the offender serve the remainder of his or her sentence in jail” (*Proulx*, *supra* note 14 at para 39).

³⁷² When an allegation of breach is made in relation to a conditional sentence, the business practice within courts (BC) is to open a subsequent file with an “S” suffix. These cases were then cross-referenced with conditional sentence breach outcome codes.

³⁷³ This query captured all alleged breaches, whether subsequently proven or not. Unproven breaches included outstanding warrants, withdrawn allegations, or situations in which disputed breaches were declared “not proven” (reasonable grounds not satisfied).

Table 3-3 JUSTIN codes - conditional sentence breach outcomes

RESULT CODE	DESCRIPTION
OSA	original sentence applies
CCO	change of conditions due to a breach of conditional sentence order
CSS	conditional sentence order suspended (x days to be served in custody)
XCJ	CSO terminated (balance of sentence served in custody)

Validation of dataset 2

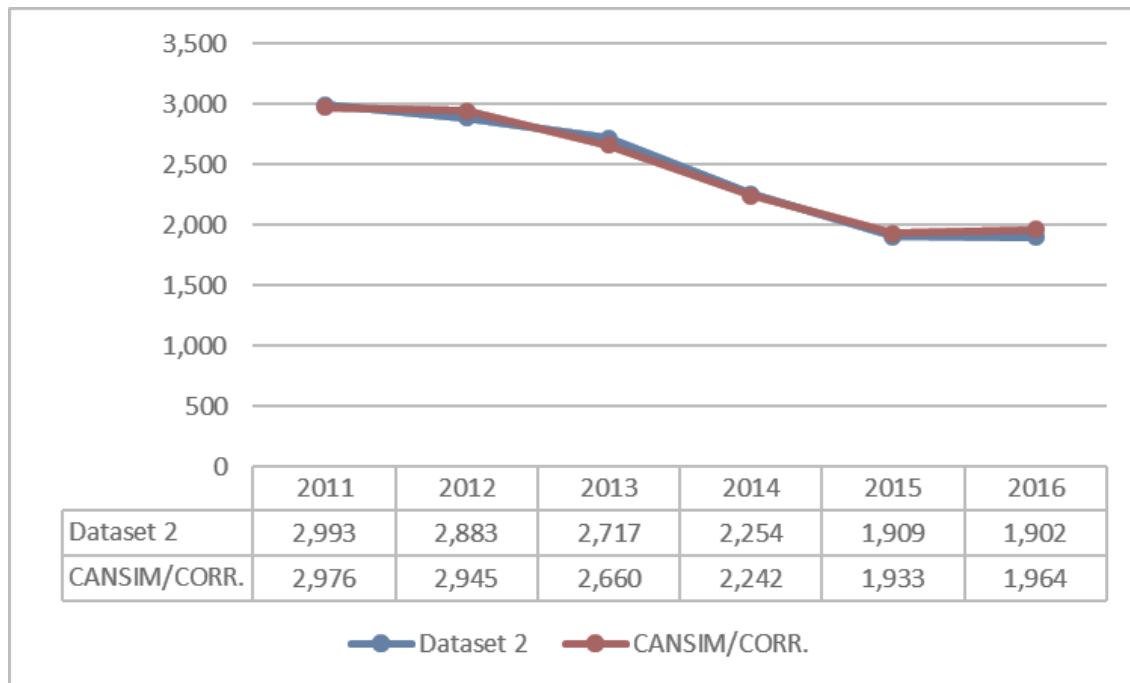
Dataset 2 was validated by comparing its count of conditional sentences with the count reported by Corrections through surveys³⁷⁴ submitted to the Canadian Centre for Justice Statistics.³⁷⁵ Although not directly comparable,³⁷⁶ the results suggest that the counts reflected in dataset 2 are essentially the same as those reflected in the official count (see Figure 3-1). In 2015, for instance, dataset 2 counted 1,909 conditional sentence orders, while the 2015/2016 Corrections count was 1,933. Data regarding conditional sentence breaches (incidence of and judicial response to) could not be validated against an existing dataset as none currently exist. As will be discussed in a later section, however, the breach data were consistent with the findings of other projects that have examined non-compliance on a smaller scale.

³⁷⁴ For example, the Adult Correctional Services (ACS) Survey and the Integrated Correctional Services Survey (ICSS).

³⁷⁵ Statistics Canada. Table 35-10-0014-01 (formerly CANSIM 251-0020) "Adult admissions to correctional services." Preferences set to display admissions (count) to conditional sentencing in BC between 2010/11 and 2017/18.
<https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001401>

³⁷⁶ Dataset 2 is organized by calendar year; the CANSIM dataset is organized by fiscal calendar year. For the sake of comparison 2011/12 is compared to the calendar year 2011.

Figure 3-1 Dataset 2 vs CANSIM/CORRECTIONS—conditional sentence count



3.2.1.3 Optional conditions - dataset 3 – conditional sentences vs suspended sentences

One of the most interesting post Bill C-10 questions is whether judges are using suspended sentences in cases in which they would have imposed a conditional sentence, had it been available. This is relevant to the issue of net-widening since the failure to convert conditional sentences into traditional terms of imprisonment (in the case that conditional sentences are no longer available) suggests that the conditional sentences previously imposed did not represent true prison alternatives. Indeed, to the extent that judges choose, instead, to suspend sentence, it could be argued that they are employing circumvention strategies (i.e., creating disguised conditional sentences) to avoid the consequences of earlier (pre Bill C-10) “up-tariffing” of sentence ranges on certain offences.

Like dataset 1, dataset 3 takes advantage of a natural experiment in that it adopts a pre/post Bill C-10 research design, in this instance to look at changes, over time, between suspended and conditional sentences. Notably, it includes all cases

(n=736)³⁷⁷ that involved either sanction when imposed on at least one drug trafficking offence³⁷⁸ in either 2011 (pre Bill C-10) or 2017 (post Bill C-10). Information obtained includes: the type of order, sentence length, and optional conditions imposed. Through the analysis of this detailed information, this study is able to comment on a practice that has, until now, been primarily a topic of academic speculation³⁷⁹ or legal argument.³⁸⁰

3.2.2 Survey and interviews with Provincial Court Judges (BC)

3.2.2.1 Survey (40 participants)

This study uses a judicial questionnaire (survey) as one of the key data collection techniques (see Appendix D for a text copy of the online survey). On the one hand, surveys can be an inexpensive way to collect a large amount of standardized data in a relatively short period of time. On the other hand, response rates can be a challenge, and by design the format of a survey does not allow for follow-up questions that might promote a more in-depth understanding of the issue being explored. Both concerns were somewhat mitigated by the fact that the survey was not the sole data source and that critical issues could be further explored through the planned interviews.

³⁷⁷ Of these, 76.8% (565/736) involve a single trafficking offence; 23.2% (171/736) involve more than one trafficking offence. It is evident from the conditions imposed that some orders covered other charges as well; upon review, these tended to be associated possession and/or breach offences. While dataset 1 isolated 'single charge' cases, that step was not deemed necessary with this dataset since drug trafficking would be the most serious offence in almost all cases.

³⁷⁸ The decision to focus on drug trafficking offences is informed by the following considerations: 1) drug trafficking offences regularly attracted conditional sentences prior to Bill C-10; 2) The restrictions introduced by Bill C-10 had the result of making most drug trafficking charges ineligible for conditional sentences, and in most cases, no mandatory minimum sentences are prescribed; and 3) The BCCA decisions which addressed the use of suspended sentences for offences no longer eligible for conditional sentences arose from appeals on drug trafficking charges.

³⁷⁹ Most notably, Webster & Doob (2019) discuss the post Bill C-10 appearance of the "new" suspended sentence, one that is more punitive and "bears substantial similarities to the conditional sentence," *supra* note 1 at p. 195.

³⁸⁰ For instance, in *Bankay*, the Ontario Court of Appeal referenced such efforts as "disguised conditional sentence[s]," holding that it was an error in law to "impose a sentence that circumvented Parliament's decision to exclude conditional sentences for this offence" – *R. v. Bankay*, 2010 ONCA 799, at para 2.

The decision to survey Provincial Court judges,³⁸¹ as opposed to another group (e.g., prosecutors), was informed by the following considerations. First, as noted elsewhere, not many studies have included the voices of these key decision-makers. Particularly when interested in sentencing decisions, the inclusion of this criminal justice actor can provide much needed context regarding the goals being pursued as part of the sentencing exercise and the value placed on the various available sanctions. Second, a national survey of judges had been done in 1998. As such, the judicial survey permitted an exploration of how judicial perspectives on conditional sentencing had evolved since then, especially given that the earlier survey was conducted shortly after the sanction was introduced, and prior to the decision in *Proulx* (2000).³⁸²

A secure survey application (WebSurvey) provided by Simon Fraser University was used to minimize security issues and address concerns associated with storage of data outside of Canada.³⁸³ Providing only an online option to complete the survey eliminated concerns about confidentiality as responses were anonymous and only non-identifying background information was collected.³⁸⁴ The link to the online survey was distributed to judges through the Office of the Chief Judge (OCJ). Survey responses were accepted between February 20, 2018 and July 24, 2018, with a total of 40 responses received by that date.³⁸⁵

³⁸¹ A study conducted with appellate court judges suggested that further research should incorporate the views of trial court judges. Roberts, J. V., & Manson, A. (2004). *The future of conditional sentencing: Perspectives of appellate judges*. Dept. of Justice Canada, Research and Statistics, at p. 21. Given that most sentence decisions (95-98%) occur in the Provincial Court, as opposed to the Supreme Court, it made sense to focus on this group of judges.

³⁸² The 1998 National Survey collected responses from 461 judges across Canada. See Roberts, et al., *supra* note 13 at p.2. Although many who participated had limited experience with conditional sentences at the time, the results were informative as they provided insight into the early perspectives of sentencing judges. Responses specific to the 51 British Columbia judges who participated in the 1998 survey were provided to me for the purpose of comparative analysis.

³⁸³ Using the WebSurvey tool provided by Simon Fraser University ensured that no data would be stored outside of Canada—a practice that often occurs with other survey tools.

³⁸⁴ All data collected through the WebSurvey application were securely stored on SFU servers controlled by the University's privacy policies regarding personal data; original responses were deleted once the survey was closed, and results were downloaded.

³⁸⁵ The online questionnaire was drafted in consultation with the Office of the Chief Judge (BC). The survey link was distributed as follows: to sitting judges on February 20, 2018; and to a small group of recently retired judges on March 20, 2018. Notably, no reminders were sent out, although the judges did receive one "notice of extended deadline."

The survey included 20 questions (several of which were deliberately repeated from the 1998 National Survey) and allowed for a variety of response options. For instance, eight of the questions were open-ended and eight provided a scaled list of responses to choose from—e.g., always, usually, sometimes, almost never, never. The remaining four were variations of yes/no questions, two of which allowed for expansion—i.e., why, or why not? Participating judges were asked for limited demographic information, including their status (full-time or part-time), assigned region, and the number of years he/she had been on the bench. This information was collected solely for the purpose of assessing representation of the various groups, not for purposes of comparative analysis between judges.

3.2.2.2 Interviews (24 participants)

As part of the survey, judges were invited to contact me by email if they were interested in participating in a brief follow-up interview. While this process was self-selecting, it was also likely to attract those judges most interested in sentencing issues, which was seen as an advantage. Additional participants were recruited internally, either by participating judges who encouraged colleagues to contact me (i.e., snowball sampling), or by informal contacts I made while participating in other court-related events in an unofficial capacity. Judges who expressed interest in participating were provided with additional information about the research project that addressed issues of voluntariness, anonymity, and confidentiality (see Appendix E for Form B). A total of 28 judges expressed interest in participating; 24 interviews were conducted between May and October 2018.³⁸⁶

Interviews were semi-structured in nature. In some cases, questions allowed for a follow-up on issues raised in the survey—e.g., clarifying the goals of conditional sentencing. More often, they reflected issues raised in the literature or jurisprudence. Several questions, for instance, asked judges to address the distinctions between conditional and suspended sentences (see Appendix F for interview schedule). While all participants were asked to consider the same broad “starting point” queries, unscripted follow-up questions were used to clarify responses. The lack of a rigid structure allowed

³⁸⁶ Three judges elected not to participate after reviewing the Form B provided; one withdrew after the Form B was reviewed in person, but prior to the commencement of the interview.

participants to talk about issues in which they had a particular interest, which may have put them at ease and resulted in longer responses.

The average interview was 52 minutes; the range was from 22 minutes to one hour and 40 minutes.³⁸⁷ All but one interview was conducted in person; one was done by telephone at the request of the participant. Most interviews took place in offices located within courthouses; three took place in public spaces. With each participant's permission, interviews were audio-recorded for accuracy and transcribed (by me) within one week of the interview.³⁸⁸ De-identified transcripts were sent to each of the participants for review and comment on content prior to the transcript being finalized. All 24 participants accepted the transcripts as accurate, four of them after minor grammatical edits were made.

3.3 Data analysis

3.3.1 Court datasets – sentences – breaches – conditions

There were three separate court datasets, each created to respond to a different issue: sentence outcomes or details (1), breach allegations and outcomes (2), and optional conditions imposed (3). Each of the three datasets were imported into SPSS³⁸⁹ and analyzed using the accompanying software package. The methodological approach was quantitative, relying exclusively on descriptive metrics. Comparative or longitudinal analyses were done where there was an interest in exploring change over time. The sentence outcome dataset (1), for instance, was subjected to longitudinal analysis to ascertain the impact that sentencing restrictions had on the use of conditional sentences.

³⁸⁷ The two shortest interviews (22 and 25 minutes) were conducted over court breaks and were limited by pre-declared time constraints.

As was the case with the survey, the list of initial questions was developed in consultation with the Office of the Chief Judge. Participants were told they would not be identified as part of the study and no records that disclose identifying information would be retained.

³⁸⁸ Questions and answers were typed out verbatim, with only slight grammatical changes made to ensure that responses were accurate but understandable. Case specific details were not transcribed, nor were responses that were unrelated to the topic of sentencing.

³⁸⁹ SPSS is the abbreviation for *Statistical Package for Social Sciences*, one of the most widely used software to perform statistical analysis.

Sentence outcomes – dataset 1

For dataset 1, the *unit of analysis* is a sentence recorded against a single charge or count, which essentially conforms to the traditional “case” definition in that it represents all charges dealt with by an offender that received a final disposition (sentence) on the same date.³⁹⁰ This dataset was used for two purposes. First, it provided general descriptive information regarding the cases captured. This included identifying offences, sentences imposed (primary sentence as well as any combinations), and sentence length. Aside from these limited general analyses, dataset 1 allowed for pre/post analyses of sentencing patterns for three offences that were clearly impacted by the legislative restrictions enacted under the Harper government: aggravated assault, theft over \$5,000, and drug trafficking (see Table 3-4). Selecting a violent (person) offence, a property offence, and a drug offence, allowed for a more thorough exploration of the circumvention phenomenon. To be clear, there was an interest in determining whether circumvention occurred but, perhaps more importantly, there was also an interest in understanding whether judges employed the strategy discriminately (and on what basis).

Table 3-4 Specific offences selected for analysis

Offence	Description	Rationale for inclusion
aggravated assault	s. 268 CC – indictable	no restrictions prior to Bill C-9 post Bill C-9 personal injury offence post Bill C-10 not eligible for a CSO
theft over \$5,000	s. 334(a) CC – indictable	no restrictions prior to Bill C-10 post Bill C-10 not eligible for a CSO
drug trafficking	s. 5(1) & (2) CDSA – indictable if Schedule I or II substance ³⁹¹	no restrictions prior to Bill C-10 post Bill C-10 not eligible for a CSO

³⁹⁰ This definition is identical to that adopted by the Canadian Centre for Justice Statistics (CCJS). Specifically, it defines a case as “one or more charges against an accused person or company, which were processed by the courts at the same time (date of offence, date of initiation, date of first appearance, or date of decision), and received a final decision.” Source: Statistics Canada. Table 35-10-0031-01 Adult criminal courts, guilty cases by most serious sentence - Footnote 2 - <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510003101>

³⁹¹ Schedule I includes most so-called “hard drugs” e.g., heroin, cocaine, fentanyl, etc. Schedule II includes, amongst other things, cannabis, its preparations, and derivatives. Limited exceptions include trafficking in marihuana under 3 kilograms which remains eligible for conditional sentencing; MMPs can apply in certain circumstances, as set out in s. 5(3)(a) CDSA.

Counts, rates, percentages

The complexity of sentencing requires a number of measures, and, whenever possible, researchers should provide multiple mechanisms by which patterns and changes can be assessed.³⁹² It is helpful, for example, to know what percentage of cases result in terms of imprisonment as opposed to conditional sentences. It is equally important, however, to gather details regarding sentence length and, in the case of non-custodial options, conditions imposed. In addition to collecting this type of detailed information, the current study employs three descriptive statistics: counts (raw numbers), rates (per 100,000 population) and percentages (sanction use relative to all sanctions). Though simple, these basic descriptors can answer many questions surrounding sentencing patterns and have been relied upon for the bulk of criminal justice research to date.

Count information is valuable in that it gives a sense of the scale of impacts and can reflect changes over time (e.g., how many charges resulted in conditional sentences in any given year). Counts, however, do not work well when the overall volume is changing, as has been the case over the last decade with the much discussed “crime drop.”³⁹³ Similarly, knowing how many conditional sentences (count) were imposed in a given year tells us nothing about their use relative to other sanctions. The latter point is critical given that we cannot assume that every conditional sentence replaces a term of imprisonment.

Calculating *rates* per 100,000 (population) offers another perspective on sentencing data by assessing the use of each sanction (count) as a function of the

³⁹² Webster, C. M. (2006). *Understanding the Provincial criminal courts in Ontario: Methodological suggestions*. Report to the Court Services Division, Ministry of the Attorney General, at p. 10.

³⁹³ For example, imagine that you are curious about the utilization of conditional sentences in a location where the only sentencing options available to a judge are jail, conditional sentences, or suspended sentences with probation. If you are told that in year #1 there were 30 conditional sentences imposed, and in year #2 there were 15, that would tell you nothing about the use of conditional sentences relative to jail or suspended sentences. You might be tempted to conclude that there has been a substantial drop in the use of conditional sentences (from 30 to 15), but you would not know whether that was because there were fewer cases overall, or whether judges were imposing jail or suspending sentence instead. If you were told that in the second year there were only half as many cases being sentenced, then conditional sentence utilization would appropriately be described as stable (relative to the use of other options).

population.³⁹⁴ Rates are the conventional measure in research that seeks to measure change over time, given that they allow for the standardization of the denominator (population size). Rates, however, are very sensitive to small occurrences or fluctuating populations. In the biblical story of Cain and Abel, for instance, the killing of Abel increased the homicide rate from 0/100,000 to 1/100,000.³⁹⁵

The third method of analysis focuses on *percentages*, reporting on the use of each sanction as a percentage of all primary sanctions. This measure controls for changes in overall volume, which is especially important when making comparisons over time. Including percentages allows descriptive data to be framed from multiple perspectives. For instance, while it is helpful to know that in 2006 there were 5,000 charges in BC that resulted in conditional sentences, it is more helpful to know that conditional sentences accounted for approximately 10% of the sentences imposed that year. This strategy assumes a general stability in the relative utilization of sanctions over time, which can be a limitation when there are substantial changes in the use of other sanctions.³⁹⁶

While most calculations used all three measures (counts, rates, and percentages), results are generally reported using percentages, for several reasons. First, this calculation controls for changes in overall volume (i.e., it is less skewed by the crime drop). Second, it is the most relevant measure when discussing the choice made (by a judge) to use any one sentence relative to all available sentence options. Put another way, the interest is not only in knowing how often judges impose conditional sentences (count), but also in knowing how often conditional sentences are imposed

³⁹⁴ In this study, rates for each sanction were calculated based on Census Canada data. <https://www150.statcan.gc.ca/t1/tbl1/en/cv.action?pid=1710000501>

³⁹⁵ In a situation in which there has been a substantial reduction in the number of cases, all sanctions may appear to be trending downwards, notwithstanding the fact that the use of one, relative to the others, has increased. In terms of population increases, if you are told that conditional sentence utilization in year #1 was 30 per 1,000 population, but in year #2 it was only 15 per 1,000 population, you might think that judges were displeased with conditional sentences and were consequently choosing to use other options. However, if you were then told that due to an employment boom in City A, the population had doubled between year #1 and year #2 (from 1,000 to 2,000), then conditional sentence utilization relative to other options could be stable.

³⁹⁶ For example, consider a small rural village of 1,000 people in which 100 thefts occurred in 2019, producing a theft rate of 1,000 per 100,000 population. If, in 2020, only 80 thefts are counted, it would appear that thefts are decreasing. If, however, the population had also decreased (from 1,000 people to 800), then the theft rate is unchanged.

relative to other available sentencing options. Finally, the use of percentages is familiar to criminal justice personnel and is consistent with the language generally used in official reports.³⁹⁷

CSO breaches – dataset 2

When exploring conditional sentencing, it is important to include an assessment of the proportion of orders that include breach allegations, as well as the judicial responses to proven breaches. Knowledge in both areas is critical given the framing of conditional sentences as punitive responses and the related interest in dealing severely with offenders who fail to comply with conditions imposed (including by committing further offences). Put another way, if the argument is that offenders will be more likely to comply with conditions because they know non-compliance will be dealt with harshly (the Sword of Damocles argument), then knowledge regarding breaches and the judicial response to proven breaches is required.

Conditional sentence breaches are presented as *counts* and *percentages*. The focus is on establishing the proportion of orders breached and exploring the judicial response to proven breaches. Given that breach reports are collapsed into a single breach per order, sentenced charges are similarly collapsed to the case level. In other words, even if a conditional sentence covers multiple charges (and/or files) it is treated as a single order for the purposes of the breach calculation. This mirrors the standard “case” definition (all charges disposed of by the same offender on the same date), except that it is being applied to a dataset that includes only conditional sentence data. The offence related to the order (and the breach) is not necessarily the “most serious offence,” as generally defined.

Notably, the original breach dataset identified breaches on conditional sentences imposed between 2010 and 2017, inclusive. However, two modifications were made. First, given the length of the orders, it was not unusual to have a conditional sentence imposed in one year but breached in the following year. As such, orders made in 2017 were eliminated. Indeed, this calendar year included many orders that, at the time of

³⁹⁷ A recent Juristat publication, for instance, speaks of 63% of cases resulting in a guilty finding and 38% of guilty adult cases resulting in a custodial sentence. See Statistics Canada, *supra* note 361 at p. 3.

analysis, were still running. Second, orders made in 2010 were also removed due to anomalous results.³⁹⁸ Within this context, the final dataset included all conditional sentences imposed between January 1, 2011, and December 31, 2016 (six calendar years), all breach allegations associated with these orders, and the judicial response to proven breaches.

Optional conditions – dataset 3

For dataset 3, a “case” is defined as a sentenced outcome (either a suspended sentence or conditional sentence order) on one or more drug trafficking offences disposed of in court on the same day by the same person. Again, this approaches the standard “case” definition (all charges disposed of by the same offender on the same date), except that it is being applied to a dataset that includes only conditional and suspended sentences.³⁹⁹ Variables of interest for this dataset include relative utilization patterns for each sanction pre and post Bill C-10, sentence length, and the number and nature of conditions imposed.

Conditions were provided in text fields that were manually coded (e.g., #1 house arrest, #2 curfew, #3 community work service, etc.). These coded entries were subsequently imported into SPSS for analysis. In light of the focus in the case law on the rehabilitative nature of probation (as contrasted with the punitive nature of conditional sentences), the primary focus in terms of optional conditions was on the inclusion of curfew, house arrest, or community service requirements on either order. However, all other conditions were also coded and recorded, resulting in a total of 20 optional conditions.⁴⁰⁰

Given the interest in determining whether judges were effectively reconstructing suspended sentences as disguised conditional sentences, efforts were made to rule out

³⁹⁸ The reason for these results is unknown.

³⁹⁹ The focus is on the conditions attached to suspended sentences or conditional sentences imposed on drug trafficking charges in the two calendar years (2011 and 2017). While each case includes at least one drug trafficking offence, it is possible that the sentence imposed also covers other offences. Cases in which drug trafficking was charged, but a plea was entered to an included or lesser offence (e.g., drug possession) were excluded from this analysis.

⁴⁰⁰ A category identified as “other” captured any condition that did not otherwise fit into an existing group. In terms of detail, where an order included a community service work requirement, the number of hours ordered was also collected.

alternative explanations for any pre/post findings. The clear shift from conditional sentences to suspended sentences on drug trafficking offences, for instance, could arguably be linked, not to the Bill C-10 restrictions but, rather, to the nature of the substance involved,⁴⁰¹ or to the offender having served time on remand awaiting sentencing.⁴⁰² These possibilities were ruled out through the manual collection of additional information on the files included in this dataset.

3.3.2 Survey

Given that the survey included both closed (yes/no; multiple choice) and open-ended questions, two tools were used during the analysis. For the 12 closed questions, each response option was assigned a numerical code and SPSS was used to analyze frequencies for reporting purposes. Responses to the remaining eight open-ended questions were imported into NVivo to allow for the thematic coding and categorization of responses. Where appropriate for presentation purposes, coding categories were created from the data to allow for a quasi-quantitative analysis. For example, question 12 asked: *When imposing house arrest on a conditional sentence do you regularly include electronic monitoring? (yes/no; why or why not?)* The first round of coding for this question captured the yes or no response, noting that almost three-quarters (74.4%) of the judges surveyed answered “no” or “never” to this question. In terms of the “why not” follow-up, the 29 judges who indicated that they did not regularly use electronic

⁴⁰¹ The substance involved (e.g., marihuana, cocaine, heroin, fentanyl, etc.) is relevant to the sentencing decision since some charges involving marihuana are considered to be less serious and remain eligible for conditional sentences post Bill C-10; on the other hand, offences involving fentanyl are treated as more serious (than other Schedule I drugs) and should be subject to longer terms of imprisonment. In *Smith*, the court establishes a higher range for trafficking in fentanyl (18 to 36 months imprisonment) than for trafficking in other Schedule I substances (6 to 12 months imprisonment, e.g., cocaine or heroin). See *R. v. Smith*, 2017 BCCA 112. BUT see also *R. v. Schneider*, 2019 BCCA 310—in which the Court upholds a suspended sentence for trafficking in fentanyl.

Note: The substance was determined for the 2017 files only. The 2011 files had been archived and as such, this information was not readily accessible.

⁴⁰² Credit given for time served on remand can skew sentencing data by giving the appearance of leniency when, in fact, the sentence reflects unrecorded time already served in pre-trial custody as a result of the offence. It can be difficult to ascertain the impact of time served when an offender is given a non-custodial sentence, unlike terms of imprisonment, where judges, since 2010, have been required to specify time credited for the record (s. 719(3.3)).

monitoring provided 45 explanatory responses,⁴⁰³ which were ultimately collapsed into six categories (see Table 3-5).

Table 3-5 Example - coding survey responses

Response to “why not” use electronic monitoring? (Q#12)	Frequency	Percentage
Cost or insufficient resources	16	35.6
I did not know it was available or it was not requested	11	24.4
Offender not suitable (e.g., no telephone)	7	15.6
The technology is unreliable/ police checks are better	4	8.9
If the offender is that high risk or untrustworthy, he/she should be in jail	4	8.9
other	3	6.7
Total 29 judges*	45	100.0

*Judges provided multiple responses (29 judges provided 45 responses)

In many cases, particularly when dealing with the open-ended questions, direct quotes are also referenced to emphasize the views expressed. For example, when responding to a survey question that asked judges whether they believe that they receive adequate guidance from the appellate courts on the use of conditional sentencing (Q8), Judge #14 responded “no.” When responding to the follow-up “why not” question, this judge’s response was coded as “other” inasmuch as it did not fit into any thematic category linked to views on the appellate courts. What the judge said, however, was provocative and certainly relevant to a consideration of why judges might not have used conditional sentences in place of prison sentences—and so it was flagged for use in a later section that explores this issue. Each survey response set was given a unique identifier for this purpose (e.g., Judge #1, Judge #2, and so on).⁴⁰⁴

3.3.3 Interviews

The interviews provide a rich source of descriptive data regarding judicial perspectives on conditional sentencing, allowing for a more contextualized understanding of how (or why) the sanction may have failed as a mechanism for prison reduction. Interview transcripts were subject to thematic content analysis for this purpose. This involved the classification (into nodes and sub-nodes) of content relating

⁴⁰³ Where survey questions asked for a single or primary response, only the first response was counted. This is consistent with the practice employed as part of the 1998 National Survey, Roberts, et al., *supra* note 13 at p. 55.

⁴⁰⁴ Survey participants are identified by number (e.g., Judge # 1), whereas interview participants are identified by letter (e.g., Judge A).

both to topics raised by the interviewer, and those raised by the participating judges. Given the semi-structured nature of the interviews, it was not unusual to have judges introduce and develop themes of their own and, in many cases, these offered invaluable insights into how judges thought of, and used, conditional sentences. The challenge, of course, was finding a way to sort their comments into meaningful and manageable bites, and to arrange (and rearrange) concepts as I continued working through the transcripts.

To this end, each transcript was imported into NVivo. The first round of coding captured responses most directly related to the questions posed. This initially included the creation of nodes for broad categories with expected themes—e.g., “CSO goals”, “CSO breach provisions”, and “CSO vs SS.” Subsequent reviews led to the creation of additional nodes which represented additional content or issues raised during the interviews. Examples of these (unexpected) thematic nodes include “comments on Proulx,” “resource/monitoring issues,” or “creative responses to restrictions.” In effect, the original concepts were expanded as additional themes emerged from the data.

Once satisfied that the relevant themes had been flagged through the initial coding process, sub-nodes were added so that additional detail could be mined and captured within each node. In some cases, this allowed for a loose form of quasi-quantitative analysis, notwithstanding the intent being simply to organize content around different positions. For example, judges were asked to describe the goals of conditional sentencing. In the first round of coding, the response was captured in the node “CSO goals.” During a subsequent review of content within that node, two clear categories emerged (reduce use of prison, reduce reoffending); these formed sub-nodes for later analysis.

Given the diverse backgrounds and experiences of the judges, it was not surprising to find that their views on conditional sentencing were not uniform. Notably, however, the interviews revealed several areas in which there was consensus, at least in terms of identifying an issue or concern, regardless of the position then taken. For example, there was general acknowledgement that the sanction’s construction as an alternate form of imprisonment was problematic. For judges that accepted this premise, the challenge was convincing the public that conditional sentences were terms of imprisonment; for judges who rejected or struggled with the concept of community imprisonment, the bar was higher. In either event, it became evident that the

construction of conditional sentences was relevant to their application (i.e., the likelihood they were used as true prison alternatives), and so such content was coded as part of the thematic analysis.

3.4 Limitations – the perfect is the enemy of the good

Court datasets

The most substantive limitation of the court data used in this project is that they are not directly comparable to other existing (or available) datasets.⁴⁰⁵ Notably, however, matched sanctions from datasets 1 and 2 were consistent with those reported by CCJS through the CANSIM portal (see Appendix C for more detailed information regarding validation), suggesting that the data are reliable despite being organized differently. It is also important to remember that the primary value of the project datasets is in their ability to identify changes over time through longitudinal analysis *within the same dataset* (apples to apples). Put another way, these datasets were never intended to be used as part of a comparative analysis *with another dataset*.⁴⁰⁶

There are two other research design decisions that must be mentioned. While each presents a limitation, the value gained was thought to justify the choice made. First, this study was limited to a single province (BC). Given the variability amongst provinces/territories when it comes to sentencing, results cannot be generalized beyond BC. Theoretical and pragmatic considerations, however, made BC the best province within which to conduct a more in-depth analysis of conditional sentencing. Second, the decision to focus on single charge cases in dataset 1 meant that comparisons could not be made with results obtained in other studies that included multi-charge cases. The benefit, however, was that it allowed for a more meaningful exploration of sentencing patterns on a category of specific offences (single charge cases). While findings could not be generalized beyond the single charge population, the focus was less on

⁴⁰⁵ Differences between the data used and those available through Statistics Canada (CANSIM) include: time period (calendar year versus fiscal year); unit of analysis (“sentenced charge” versus “case” [before reducing to single charge cases]); statutes included (CCC [without impaired] & CDSA versus all federal statutes); definition of “primary” sentence (J, CSO, F, SS, CND, ABD versus “MSS” - J, CSO, P, F, other); probation treated as a secondary sanction versus as a primary sanction; no “other” category versus a broad “other” category.

⁴⁰⁶ In addition, a dissertation would seem to be an appropriate place within which to explore the utility of looking at things from a different perspective.

establishing overall sentencing patterns, and more on identifying evidence of discontinuity in the application of conditional sentences (and other sanctions) post Bill C-10.

Survey and interviews

The response rate for the survey was 25% (40/160). This is consistent with the 27% response rate reported in 2006 for a survey of BC judges,⁴⁰⁷ but low when compared with the 1998 National Survey which reported an overall response rate of 36%.⁴⁰⁸ There is reason to believe that online surveys, though certainly accessible and efficient, present their own challenges in terms of response rates.⁴⁰⁹ Indeed, as the use of such survey tools has increased, response rates have decreased.⁴¹⁰ In this project, strategies designed to improve response rates (e.g., sending reminders) were not available. While a higher response rate for the survey would have been preferable, the number of judges who agreed to participate in interviews exceeded expectations.

The qualitative design of this study and the relatively small number of participating judges resulted in findings that are not highly generalizable. Notably, however, participants represented diverse backgrounds and demographics, including gender, status (full-time, part-time, retired), and years sitting as a judge. Each of the five geographic regions was represented by at least one participant, though overall, the number of judges from lower mainland locations (Vancouver and Fraser regions) was disproportionately high. Regardless, it is important to keep in mind that the intent of this study was never to produce results that would be generalized to all of Canada, or even to all of BC.

Rather, the goal in conducting the survey and interviews—and, for that matter, the court datasets as well—was to capture a snapshot of judicial perspectives on the evolution of conditional sentencing since their inception, in order to unravel some of the

⁴⁰⁷ Edgar, A., & Roberts, J. (2006). *Victim Impact Statements at Sentencing: Judicial experiences and perceptions*. Canada Department of Justice, at p. xii.

⁴⁰⁸ Roberts, et al., *supra* note 13 at p. 2.

⁴⁰⁹ These include too many emails overall and too many online surveys. Sue, V., & Ritter, L. (2018). *Conducting Online Surveys* (2nd ed.), Sage Publications, at p. 2.
<https://doi.org/10.4135/9781506335186>

⁴¹⁰ Ye, J. (2006). *Overcoming challenges to conducting online surveys*. 83–89, at p. 84.
<https://doi.org/10.4018/978-1-59140-792-8.ch008>

complexities of this sentencing option as it relates to incarceration rates. Indeed, this mixed methodology adds a valuable dimension to our current understanding of the impact of conditional sentences of imprisonment. By focusing on the day-to-day experiences of judges and capturing them in a variety of different ways, we see how this sanction has been understood and used over time. By extension, such findings can shed new light on the unexpected failure of conditional sentences in terms of prison reduction.

4 Results – making sense of it all

As Clayton Ruby observed more than two decades ago, sentencing law is increasingly complex, though rarely improved.⁴¹¹ While the task of making sense of sentencing is daunting, that does not mean we should not try. How else can we hope to understand this critical, and most public-facing area of the criminal law? How do we explain, for instance, why the introduction of conditional sentences did not have a more meaningful impact on overall imprisonment rates, or why there has been so much variability across provinces/territories? Where the sanction has clearly failed, what happened? What can we learn from its disappointing performance—and how can that knowledge assist us as we move forward?

While there are no simple answers, there are concepts that can help us better understand the dynamics at play, and that can at least partially account for the unexpected results. In the context of conditional sentences, these include net-widening, up-tariffing, and circumvention, each of which is relevant to the narrative that has emerged around conditional sentencing in BC. Net-widening as the most likely explanation for the sanction's failure to demonstrate any important or sustained reduction in prison populations, up-tariffing as the device which—in part—enabled net-widening, and circumvention as the judicial response to sentencing restrictions seen as being unduly harsh (in part due to up-tariffing). The following sections use these concepts to frame this project's principal findings. In most instances, this will include the integration of results obtained from the various data sources. A brief description of each follows.

4.1 Descriptive presentation and analyses

4.1.1 Court datasets

The following sections provides a descriptive overview of the three court datasets developed for this project: sentence outcomes (1), breaches (2), and conditions (3).

⁴¹¹ Ruby, C. C. (1999). Foreword. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (pp. vii–viii). University of Toronto Press.

4.1.1.1 BC sentence trends 2006-2017 (dataset 1)

Of the 169,456 cases in this dataset, almost all (98%) were concluded at the Provincial Court level. In terms of the distribution of charges by statute, most sentences were for offences under the *Criminal Code* (90.2%) rather than the *Controlled Drugs and Substances Act* (9.8%). The single charge cases captured by dataset 1 represented approximately one-third (35%) of all sentenced charges (not cases) concluded in BC in the calendar years 2006 through 2017 inclusive.⁴¹² The crime drop was evident when the number of cases was broken down by calendar year (see Table 4-1). Overall, between 2006 and 2017 the number of single charge cases dropped by 21.6%.

Table 4-1 Number of cases by calendar year (2006 to 2017) - dataset 1

Year	Cases	Change		Year	Cases	Change	
		Number	Percent			Number	Percent
2006	15,012			2012	14,042	-417	-2.9%
2007	16,149	1,137	7.6%	2013	13,307	-735	-5.2%
2008	16,221	72	0.4%	2014	12,560	-747	-5.6%
2009	16,128	-93	-0.6%	2015	12,185	-375	-3.0%
2010	15,299	-829	-5.1%	2016	12,327	142	1.2%
2011	14,459	-840	-5.5%	2017	11,767	-560	-4.5%
Total					169,456		

Offence profiles – overall – primarily summary offences

While the media tends to focus on serious, high profile offences, we are reminded that the bulk of criminal offending occurs at the lower end of the seriousness scale. Indeed, the most common offences overall were breach of probation (18.5%), theft under \$5,000 (17.8%), common assault (12.1%), and failing to either appear in court or comply with release conditions (7.5%). Together these offences accounted for over half (55.9%) of the cases included in the 2006 to 2017 single charge dataset. Notably, the top ten offences accounted for over three-quarters (75.7%) of the case volume; of these only drug trafficking and possibly breaking and entering (if prosecuted by indictment) are reasonably expected to have been impacted by Bill C-10 restrictions

⁴¹² Single charge cases represent, at a minimum, over half (51.7%) of all cases (based on a conservative calculation that assumes all charges that are not single charges include only two charges). Given that cases with multiple charges (e.g., four or more) were not unusual, it is likely that the single charge cases represent a substantial portion of the BC criminal court caseload. In their analysis of sentence patterns, for instance, Roberts & Birkenmayer described their single charge dataset as accounting for 79% of all cases (*supra* note 356 at p. 464).

(see Table 4-2 below). This breakdown is consistent with national figures which suggest that the bulk of the adult criminal court caseload continues to be summary offences.⁴¹³

Table 4-2 Top ten offences (single charge cases) – dataset 1

	Offence	Frequency	Percent
1	Breach of probation	31,277	18.5
2	Theft under \$5,000	30,242	17.8
3	Common assault	20,512	12.1
4	Fail to appear/Breach release	12,762	7.5
5	Drug possession	7,801	4.6
6	Drug trafficking	6,986	4.1
7	Criminal harassment/utter threats	6,164	3.6
8	Mischief - under \$5,000	5,554	3.3
9	Break & enter	3,875	2.3
10	Possession of stolen property - under \$5,000	3,213	1.9
	Total	128,386	75.7%

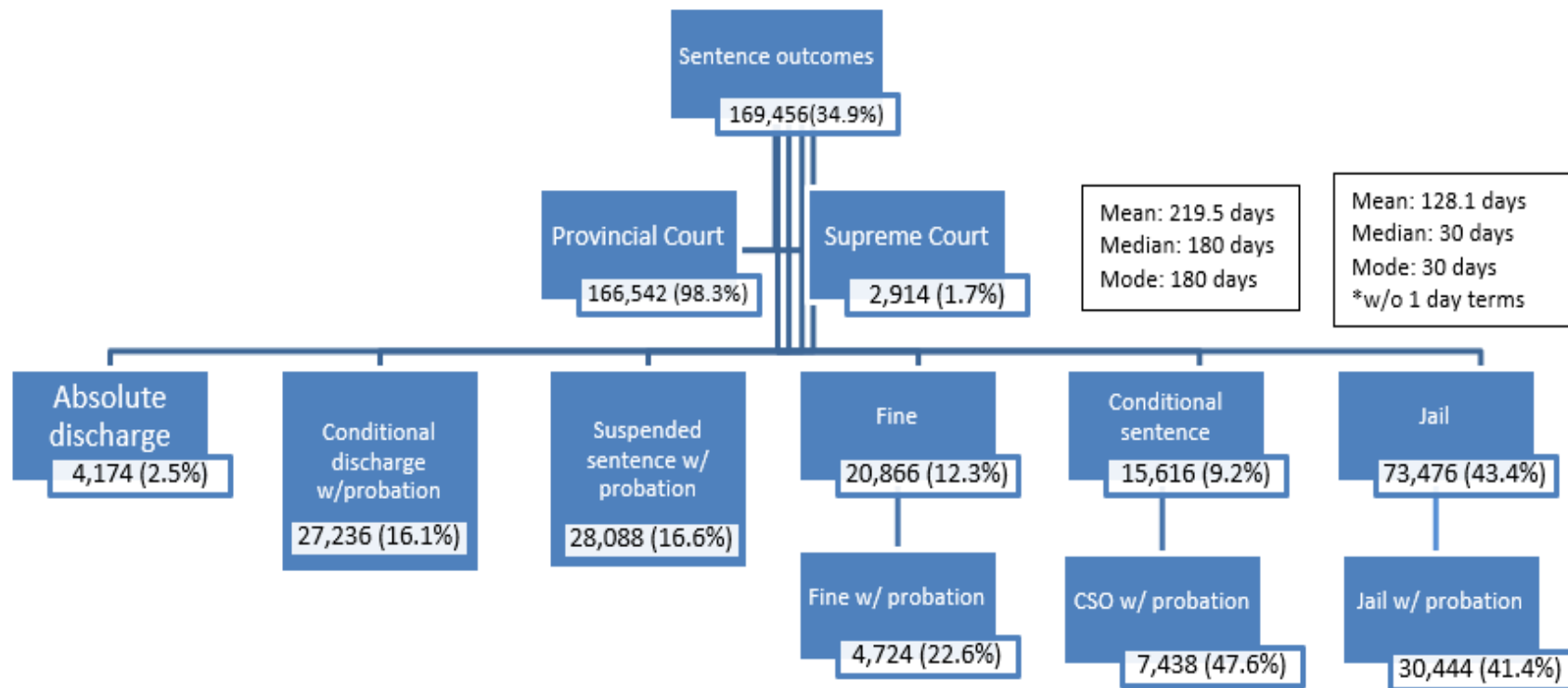
Sentence patterns – the relative use of primary sentences

The value of focusing on primary sentences, and treating probation as an attached sanction, is evident when considering the relative use of each of the six available sentencing options (see Figure 4-1). The most common sentence for cases concluded between 2006 and 2017 was prison (overall representing 43.4% of primary sentences), with 41.4% of prison sentences including probation to follow. In terms of sentence length, both the median and mode prison term was 30 days.⁴¹⁴ Conditional sentences accounted for 9.2% of sentences, with almost half (47.6%) followed by probation. Substantially longer than traditional prison terms, the median and mode for conditional sentences were 180 days (six months). Fines remained relatively popular at 12.3%; conditional discharges and suspended sentences, together, accounted for approximately one-third (32.7%) of recorded outcomes. Relatively few cases (2.5%) resulted in absolute discharges.

⁴¹³ Indeed, the breakdown in Table 4-2 largely mirrors national findings that regularly identify theft under \$5,000, failure to comply with a court order (almost always related to bail conditions), common assault, and breach of probation as four of the most common offences. See Statistics Canada, *supra* note 397 at p. 6.

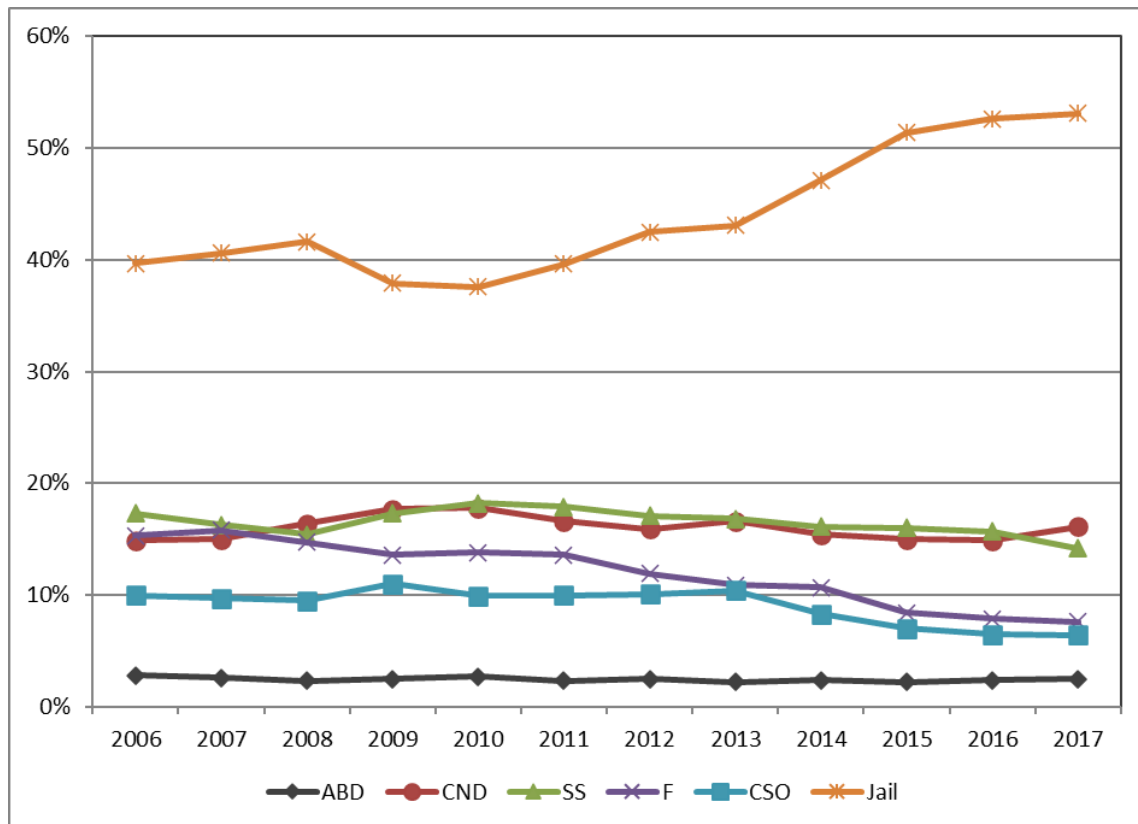
⁴¹⁴ These calculations exclude one-day jail sentences which would otherwise be the mode.

Figure 4-1 Primary sentences, probation, select sentence length – 2006 to 2017 (n=169,456)



When broken down by calendar year, we see both change and stability. For instance, the use of imprisonment was essentially stable between 2006 and 2012 (approximately 40% on average) but then increases, from 43.1% of sentences in 2013 to 53.1% in 2017 (post Bill C-10).⁴¹⁵ Notably, conditional sentences represented approximately 10% (+/- 1 %) of sentences between 2006 and 2012; their use then dropped each year thereafter, reaching a low of 6.4% in 2017 (see Figure 4-2 below).⁴¹⁶

Figure 4-2 Single charge cases by primary sentence (n=169,456)



⁴¹⁵ It is important to note that an increase in the proportion of cases subject to prison sentences is only indirectly connected to what we normally discuss as imprisonment rates. It is possible, for instance, that the proportion of offenders sentenced to prison increased while, at the same time, sentence terms were substantially decreased. This would not necessarily result in any increase to the imprisonment rate, which considers average offender counts (not admissions or sentences). It is equally important to recall that this dataset only captures single-charge cases.

⁴¹⁶ The decrease in the use of conditional sentences reflects at least two categories of Bill C-10 reforms. The first is the focus of this project and includes the restrictions introduced specifically on the use of this sanction for specific offences (as per the updated wording of s.742.1). The second includes the expanded list of offences for which mandatory minimum penalties were introduced. While not the focus of this study, offences subject to MMPs are also no longer eligible for conditional sentences. Benedet (2019) suggests that for some offences, MMPs were introduced with the intention of blocking the availability of conditional sentences (*supra* note 310).

Sentence length – short terms – one-day jail

As noted, prison sentences were generally short; excluding one-day terms, the median and mode were both 30 days.⁴¹⁷ Consistent with earlier research, almost half (48.5%) of short prison terms (less than 31 days) were imposed on administration of justice offences.⁴¹⁸ The only other offence that regularly received a short prison term was theft under \$5,000, which accounted for 18.5% of such sentences overall. Notably, there were proportionately more short prison terms post Bill C-10. For example, between 2006 and 2012 approximately three-quarters (74.6%) of the prison terms imposed were for less than 31 days; between 2013 and 2017, at a time when the use of prison was increasing, the relative use of shorter terms was also increasing, with 79.2% of the terms in those years being for less than 31 days (or 80.5% if 2013 is treated as a transition year).

While the issue of credit for time served was outside of the scope for this project, the proportion of cases with sentences of one-day prison was remarkable, accounting for almost half (48.2%) of all prison terms imposed.⁴¹⁹ Of all cases included in this database, one in five involved a sentence of one-day prison (20.9%).⁴²⁰ Notably, the use of single

⁴¹⁷ As noted earlier, all calculations of prison sentence lengths excluded the one-day terms. Doing so eliminated the downward skewing of average lengths and was thought to be a more meaningful assessment of sentence length. The latter consideration reflects the fact that one-day jail terms generally represent sentences of “time served” (length unknown or not easily determined) rather than time to be served.

⁴¹⁸ Administration of justice offences include breach of probation, failing to attend court, and failing to comply with release conditions. This result is consistent with the findings of Marinos, *supra* note 58.

⁴¹⁹ While credit for time served can be a part of any sentencing decision, one-day jail terms are the clearest indication we currently have for identifying this practice. In *Lea*, the MBCA set out the rationale as follows:

I must point out that “time served” is not a sentencing option available to a sentencing judge under the *Code*. The amount of time served can inform a decision to impose a sentence of one-day when warranted by the circumstances, but it does not permit such a sentence to in fact be equivalent to the amount of time actually served (*Lea*, *supra* note 350 at para 26).

On the prevalence of one-day jail sentence terms, see also Kinney, J. B. (2005). *Court sentencing patterns* (PhD thesis, Burnaby B.C.: Simon Fraser University). <http://ir.lib.sfu.ca/handle/1892/2367>, at pp. 162-163.

⁴²⁰ One-day jail terms represented 48.2% of all jail terms (35,435/73,476) and 20.9% of all sentences (35,435/169,456).

day terms increased in the post Bill C-10 years.⁴²¹ When cases involving sentences of one-day prison were isolated, an interesting pattern emerged. That is, up until 2013 most one-day jail terms (60-67%) did not include probation to follow. This starts changing in 2013, and by 2017 most (57.4%) of the one-day sentences are followed by terms of probation.

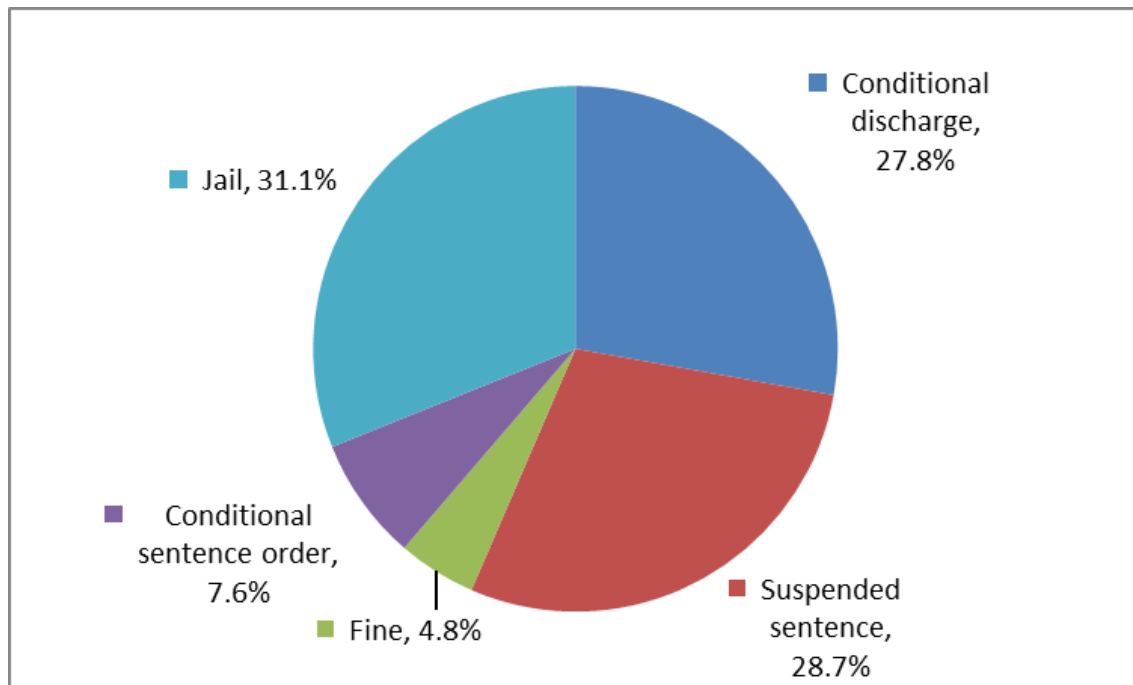
Sentence detail – the use of probation

Pursuant to sections 731(1) and 731(2), probation was assumed to form part of conditional discharges and suspended sentences; it was also recorded when attached to “stand-alone” sanctions—jail, conditional sentence, and fine. Overall, over half (57.8%) of the sentences imposed between 2006 and 2017 included a term of probation, most often tied to a discharge or suspended sentence.⁴²² The remaining probation orders (43.5%) were associated with fines (4.8%), conditional sentences (7.6%), or terms of imprisonment (31.1%) (see Figure 4-3).

⁴²¹ For the calendar years 2006 through 2012, one-day jail terms represented 45.9% of all jail terms; from 2013 through 2017, they increase to 51.1%. This change was incremental over the post Bill C-10 years, starting at 43.2% in 2013 and increasing to 58.2% in 2017.

⁴²² Of the 169,456 cases, 97,930 (57.8%) included probation. Conditional discharges and suspended sentences, combined, accounted for 56.5% of all probation orders (55,324/97,930).

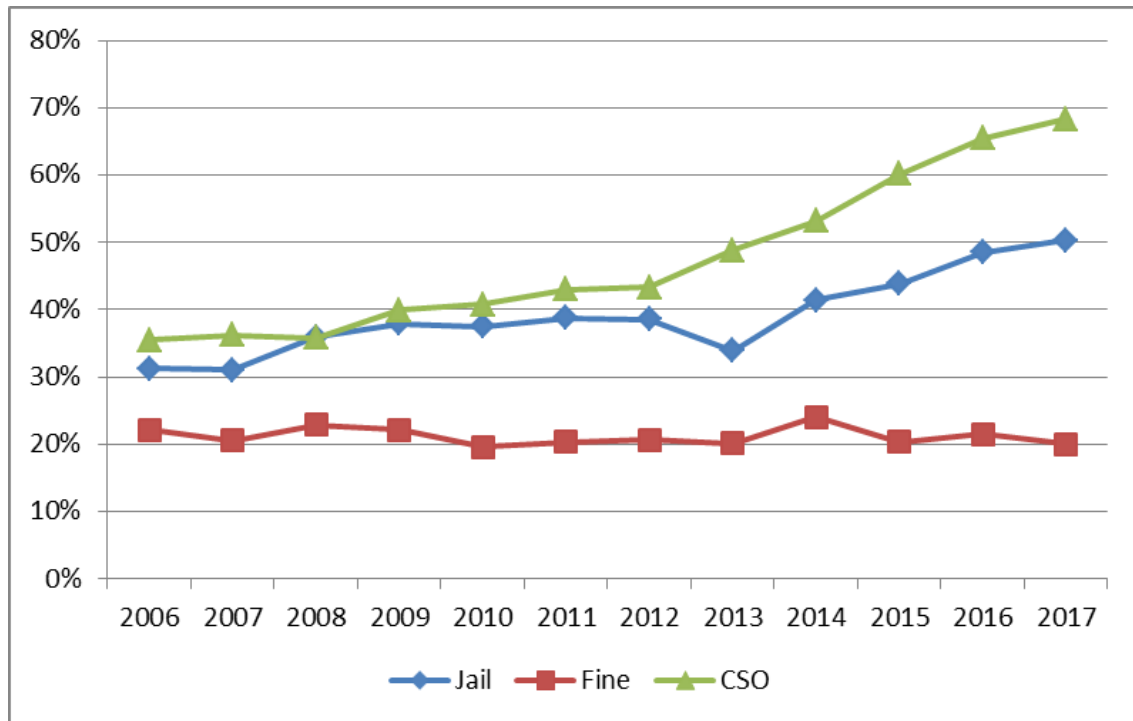
Figure 4-3 Distribution of probation 2006 to 2017 (n=97,930)



During analysis, some discontinuity in the use of probation over the years emerged. Notably, the percentage of both jail and conditional sentences that included probation to follow started increasing in 2012/2013 (post Bill C-10). Probation attached to fines remained stable, with approximately 20% of fines having attached probation orders throughout the years under study. In 2012, however, only 38.5% of jail sentences and 43.3% of conditional sentences were followed by probation; by 2017 this had increased to 50.3% and 68.3% respectively (see Figure 4-4).

And so, sentencing patterns post Bill C-10 changed in several ways that might be logically connected to the restrictions placed on the use of conditional sentences. First, to nobody's surprise, the use of conditional sentences decreased; it would have been surprising had it not. Second, judges started imposing more, but shorter, jail terms, including more one-day terms, and these shorter jail terms were more likely to have probation orders attached.

Figure 4-4 Jail, conditional sentences & fines – with probation – 2006 to 2017 (n=40,532)

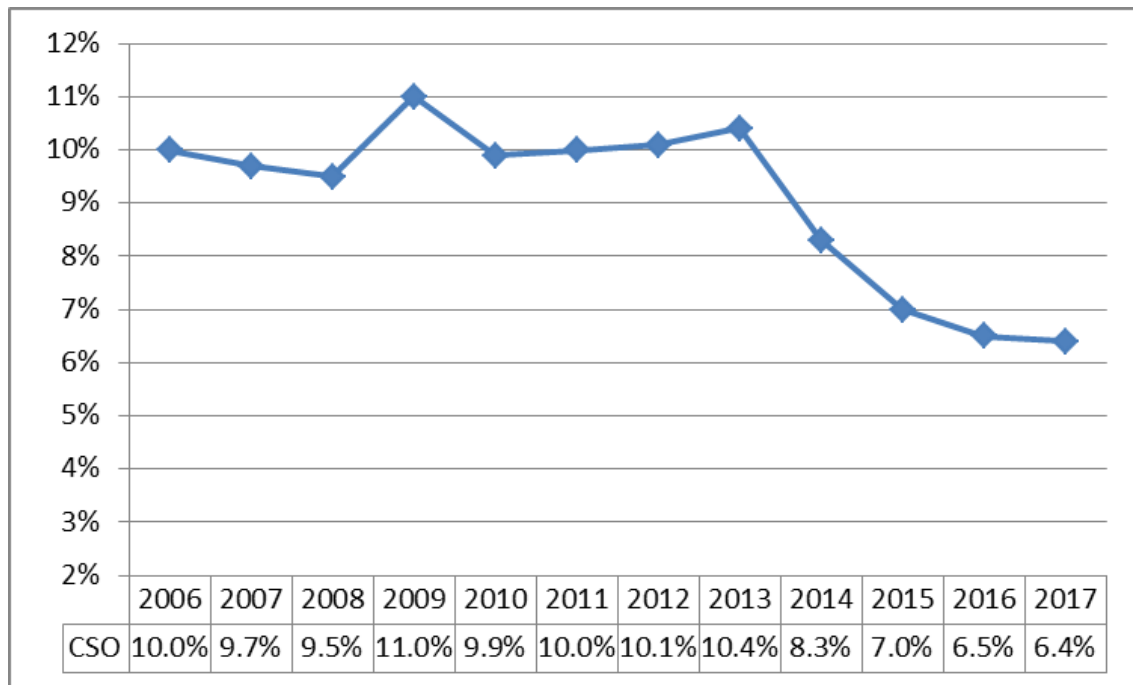


Conditional sentencing – utilization

Of the 169,456 cases concluded between 2006 and 2017, 9.2% (n=15,616) resulted in conditional sentences. Even with the inclusion of summary offences, Bill C-10 impacts were apparent.⁴²³ Conditional sentences dropped from 10.1% of all primary sentences in 2012 to 6.4% in 2017 (see Figure 4-5). This reduction is consistent with earlier findings (e.g., Webster and Doob, 2019; Reid and Roberts, 2019) which have noted the impact of the Bill C-10 restrictions.

⁴²³ Summary offences were included in this dataset for two reasons. The first was operational, reflecting an interest in gaining a sense of overall utilization patterns for conditional sentences. The second was practical, arising from an inability to determine whether an offence had been prosecuted summarily or by indictment. Given the prevalence of hybrid offences, it was only by pulling out specific (indictable) offences that analysis could be done on those charges known to have been impacted by the Bill C-10 restrictions.

Figure 4-5 Conditional sentence utilization 2006 to 2017 (n=15,616)



Conditional sentences – sentence length

Conditional sentences were consistently longer than the jail terms imposed during the same period (2006 to 2017). Both the overall median and mode for conditional sentences were 180 days (6 months); for terms of imprisonment, both were 30 days. Notably, not only did the use of conditional sentences relative to other sanctions drop considerably after 2013, but those still imposed were shorter, going from a median of 180 days in 2013 to 90 days in 2017. Until 2013, conditional sentences of less than one month were rare (<8%) and conditional sentences of more than one year were not (almost 15% in 2012). By 2017, this pattern had reversed, with 19.9% of conditional sentence orders being for a term of one month or less, and only 5.4% for a term of more than one year. Fewer (and shorter) conditional sentences make sense given that the orders were effectively restricted to less serious offences after 2012.

Given public concerns around the use of conditional sentences for serious offences, the longest orders imposed (defined as more than one year in length) were

identified for further analysis.⁴²⁴ Overall, almost 2,000 (1,999) “long” conditional sentences were captured, representing 12.8% of all conditional sentences. Notably, these orders were imposed for the more serious offences: drug trafficking/production, serious assaults, robbery, causing harm or death as a result of impaired or criminally negligent driving, and more serious property offences (e.g., theft over \$5,000 and breaking and entering). Fully two-thirds (67.5%) of the long conditional sentences were imposed in the six-year period between 2006 and 2011; less than one-third (32.5%) were imposed in the six-year period between 2012 and 2017.⁴²⁵ The imposition of fewer long conditional sentences post Bill C-10 makes sense given that it was the serious offences that were targeted. Indeed, any other outcome would have been unexpected. More importantly, these results confirm earlier research that suggests “capping” conditional sentences at one year would not impact most of the orders made.⁴²⁶ Indeed, in the years immediately preceding the sentencing restrictions (i.e., 2011, 2012), almost exactly 15% of the conditional sentences imposed were for terms exceeding one year (see Table 4-3).

⁴²⁴ It was reasonably assumed that the longest conditional sentences would be imposed on the more serious offences.

⁴²⁵ The fact that serious offences received conditional sentences post Bill C-10 likely reflects one of the following scenarios: 1) offences that pre-dated the November 2012 enactment date of the conditional sentencing restrictions; or 2) offences in which the prosecution either proceeded summarily or, where they proceeded by indictment, the maximum penalty provided was less than 14 years imprisonment.

⁴²⁶ Roberts & Gabor (2004) suggested that 86% of conditional sentences would fit within a one-year cap (i.e., capping conditional sentences at 12 months would only reduce the volume of orders made by 14%), *supra* note 30 at p. 101.

Table 4-3 Conditional sentences – sentence length (n=15,591)

	less than 1 month		1 to 6 months		6 months to 1 year		1 to 2 years		Total
	count	%	count	%	count	%	count	%	
2006	70	4.7%	737	49.1%	477	31.8%	217	14.5%	1501
2007	67	4.3%	810	51.7%	471	30.0%	220	14.0%	1568
2008	88	5.7%	762	49.3%	441	28.5%	255	16.5%	1546
2009	94	5.3%	924	52.4%	498	28.2%	249	14.1%	1765
2010	81	5.4%	831	55.0%	405	26.8%	194	12.8%	1511
2011	112	7.7%	772	53.2%	353	24.3%	215	14.8%	1452
2012	77	5.4%	785	55.5%	348	24.6%	205	14.5%	1415
2013	110	8.0%	780	56.5%	310	22.4%	181	13.1%	1381
2014	104	10.0%	616	59.0%	202	19.3%	122	11.7%	1044
2015	124	14.6%	547	64.4%	121	14.2%	58	6.8%	850
2016	118	14.7%	542	67.5%	102	12.7%	41	5.1%	803
2017	150	19.9%	487	64.5%	77	10.2%	41	5.4%	755
Total	1,195		8,593		3,805		1,998		15,591

Note: 25 cases had no CSO duration entered (attributed to clerk/registry error).

Conditional sentences - offences

When looking only at the 15,616 conditional sentences imposed between 2006 and 2017, there were several shifts in offence profile. Overall, drug trafficking accounted for the largest proportion (19%; 2,968/15,616) of conditional sentences imposed; offences of theft under \$5,000 were second, accounting for 15% (2,338/15,616). These offences, when combined with drug production/cultivation, common assault, and breach of probation, accounted for more than half (57.4%) of the conditional sentences imposed. Notably, both drug trafficking and drug production were effectively made ineligible for conditional sentences by Bill C-10. When looking only at conditional sentences imposed in 2017, the new (post Bill C-10) schedule of offences includes charges of theft under \$5,000 (accounting for 23% of conditional sentences), followed by common assault (11.1%), assault causing bodily harm (8.2%), breach of probation (7.4%), and breaking and entering (4.8%).⁴²⁷ Together, these five offences accounted for 54.5% of the conditional sentences imposed in 2017.⁴²⁸

⁴²⁷ Presumably both the offences of assault causing bodily harm and breaking and entering were prosecuted summarily.

⁴²⁸ The decision to look specifically at orders made in 2017, as opposed to a range generally used for post Bill C-10 analysis (e.g., 2013 to 2017) reflected an interest in capturing only offences that occurred after the November 2012 enactment of the sentencing restrictions.

4.1.1.2 CSO breaches (2011 – 2016) – dataset 2

Proportion of conditional sentence orders breached

Overall, 36.4% of the conditional sentences imposed between 2011 and 2016 were alleged to have been breached (5,336/14,658; see Table 4-4). This is consistent with the 37.6% rate estimated for 1998 cases⁴²⁹ and the 37.4% more recently suggested for Vancouver and the Downtown Community Court.⁴³⁰ The calculations in Table 4-4 count only the *first* proven breach on any given conditional sentence order; it was not unusual to find orders that had been breached on multiple occasions.⁴³¹ Of the breach allegations filed, 92.6% (4,942/5,336) were either admitted or proven, resulting in a judicial response; the remaining 394 orders were either disputed and unproven, withdrawn, or not yet dealt with (e.g., due to an outstanding warrant).⁴³² When broken down by calendar year, the findings suggest that post Bill C-10 conditional sentences may have been slightly more likely to be breached.⁴³³

Table 4-4 Conditional sentences & breaches by year 2011 to 2016

	Number of CSOs	Number of CSO breaches	Percent
2011	2,993	1,021	34.1%
2012	2,883	992	34.4%
2013	2,717	946	34.8%
2014	2,254	835	37.0%
2015	1,909	768	40.2%
2016	1,902	774	40.7%
Total	14,658	5,336	36.4%

⁴²⁹ North, *supra* note 258 at p. 81. The breach rate (breaches as a percentage of orders made) for conditional sentences imposed in 1998 was 37.6% (BC; select locations).

⁴³⁰ Sylvestre, et al., *supra* note 347 at p. 42. The percentage of orders breached was calculated for conditional sentences that were concluded in the calendar years of 2005 to 2012 (inclusive).

⁴³¹ In the 2011 to 2016 dataset, there were examples of a second, third, and even fourth proven breach allegation on a single conditional sentence.

⁴³² In a study that reviewed conditional sentence breaches pre/post *Proulx* in three BC court locations, most breaches were admitted (1998= 92.6%; 2000= 94.5%). See North, *supra* note 258 at p. 82.

⁴³³ One possible explanation for an increase in the percentage of orders breached relates to the loss of conditional sentences imposed on serious offences committed by lower risk offenders.

Judicial response to proven breaches (2011 to 2016)

When dealing with an admitted or proven breach of a conditional sentence, a judge has four options under section 742.6(9): 1) direct that the original sentence applies; 2) change the conditions of the conditional sentence; 3) suspend a portion of the order and direct that the accused serve a specific number of days in custody; or 4) terminate the conditional sentence and have the offender serve the balance of the term in custody.

The judicial response to breach is of interest for several reasons. First, it is an under-researched area, which is unfortunate given the direction in *Proulx* that proven breaches should be dealt with harshly, in part to distinguish conditional sentences from suspended sentences. Second, any effort to understand the relationship between conditional sentences and the use of imprisonment should, logically, include some consideration of the extent to which these initially non-custodial orders may transition into custodial orders. Finally, how a judge responds to a proven breach reveals something about his/her views on conditional sentencing and how he/she uses the sanction.

Of the 4,942 proven breaches in dataset 2, most (61.1%) resulted in the offender serving part (or all) of the remaining sentence in custody; in approximately 39% of the cases, the judicial response was to direct that the original conditional sentence would still apply, with or without amendment (see Table 4-5 below).⁴³⁴ Of course, the challenge is in determining what other consequences may have been in play. For example, an offender might be held in custody for days or weeks awaiting the breach hearing. If the judge then decides to release an offender on the original order, it would arguably not be fair to say that there was no custodial consequence.

⁴³⁴ Most (3020/4942; 61.1%) of the (first breach) outcomes involved either the suspension or termination of the conditional sentence; 1922/4942 (38.9%) of the (first breach) outcomes involved either the original sentence continuing to apply, or a change to court order (conditional sentence amended).

Table 4-5 Judicial response to admitted or proven CSO breach

2011 to 2016	Number	Percentage
Original sentence applies (OSA)	715	14.5%
Change to court order (CCO)	1,207	24.4%
CSO suspended (CSS)	1,305	26.4%
CSO terminated (XCJ)	1,715	34.7%
Total	4,942	100.0%

Notably, the judicial response to proven breach did not appear to change in any meaningful way post Bill C-10. The two non-custodial options (OSA, CCO) consistently accounted for approximately 39% (+/-1.5) of responses in each calendar year; similarly, the two custodial options (CCS, XCJ) consistently accounted for approximately 61.5% (+/- 1.5). In terms of offence profile, the offences associated with conditional sentences that were breached essentially match those identified as the most common offences overall. Indeed, the top five offences identified in Table 4-2 (offence profile for dataset 1 cases) are also the top five offences for breached conditional sentences (theft under \$5,000, breach of probation, break and enter, drug trafficking, and common assault).

4.1.1.3 Optional conditions – dataset 3 - CSO vs SS (2011 vs 2017)

In the wake of the Bill C-10 restrictions, there were concerns expressed that judges may be inappropriately using suspended sentences as disguised conditional sentences, primarily through the imposition of what had up until then been considered punitive conditions (i.e., curfews or house arrest). Dataset 3 was created to explore this issue. It included all cases resulting in a suspended or conditional sentence imposed on at least one drug trafficking offence in either 2011 (pre Bill C-10) or 2017 (post Bill C-10 and post *R. v. Voong*⁴³⁵). Cases in this dataset included information on the type of order, sentence length, and the optional conditions imposed. Capturing this information was critical to any assessment of the potential reconstruction of suspended sentences as some form of disguised conditional sentence.

⁴³⁵ *Voong*, *supra* note 34.

In one of the few recent efforts to explore the use of conditions (in Vancouver), Sylvestre, Blomley, Damon, and Bellot (2017) identified the following “most common conditions” for conditional sentences and probation orders (Table 4-6):

Table 4-6 Red Zone study – conditions - CSOs & probation (2005 to 2012)⁴³⁶

Conditions	Conditional sentences ⁴³⁷		Probation ⁴³⁸	
	Number	Percent	Number	Percent
no go	5,164	23.6%	24,559	36.4%
other	4,289	19.6%	7,913	11.7%
treatment	3,485	15.9%	12,563	18.6%
curfew	2,432	11.1%	273	0.4%
no drugs/alcohol	2,125	9.7%	1,734	2.6%
no weapons	1,280	5.9%	7,258	10.8%
area restrictions	957	4.4%	4,232	6.3%
house arrest	955	4.4%	95	0.1%
no contact	909	4.2%	7,837	11.6%
no motor vehicles	261	1.2%	1,004	1.5%
Total	21,857	100.0%	67,468	100.0%

The “Red Zone” data are relevant to this study given that the project relied upon the same data source as the current project (JUSTIN data administered by the Court Services Branch [CSB] of the BC Ministry of Justice). Specific types of conditions were calculated as a percentage of all conditions imposed (not as a percentage of orders). For example, curfew requirements represented 11.1% of all conditions coded for conditional sentences, and 0.4% for probation. The key take-away from this work is that while treatment conditions formed an important part of both conditional sentences (15.9%) and

⁴³⁶ Sylvestre, et al., *supra* note 347; table created from data pp. 40-42 (2005-2012 data - Vancouver); given that the primary interest was in assessing judicial decision-making in terms of the imposition of optional (discretionary) conditions, those that are mandatory on conditional sentences are not included for either order (e.g., reporting and residency requirements). If conditions that are mandatory on conditional sentences are counted as optional conditions when imposed on probation orders, the latter could be misrepresented as being more onerous (than the former).

⁴³⁷ In the context of the Red Zone study, the conditional sentence category included 7,042 cases in which a conditional sentence was imposed (*ibid* at p. 36).

⁴³⁸ Similarly, the probation category included 31,915 cases in which probation was imposed, regardless of whether it formed part of a discharge or suspended sentence, or was attached to a term of imprisonment, a fine, or a conditional sentence (*ibid* at p.36).

probation orders (18.6%), curfews and house arrest were common in the former (15.5%) but rare in the latter (0.5%).

BC Court data – conditional vs suspended sentences

Dataset 3 contained a total of 736 cases: 555 from 2011 and 181 from 2017. The breakdown by year and sanction is shown below in Table 4-7.

Table 4-7 Conditional sentences vs suspended sentences (n=736)

2011 files (n=555)		2017 files (n=181)	
Conditional sentences	Suspended sentences	Conditional sentences	Suspended sentences
500 (90.1%)	55 (9.9%)	28 (15.5%)	153 (84.5%)

The data clearly support the obvious—that making almost all drug trafficking offences ineligible for conditional sentences greatly reduced the use of that sanction for this offence. Indeed, if anything was odd, it was that in 2017 there were still 28 conditional sentences imposed. It is also apparent that the use of suspended sentences increased quite dramatically, though we cannot automatically assume that those would have otherwise been conditional sentences. It may be, for instance, that the 2017 suspended sentences represent cases in which offenders had spent considerable remand time in custody prior to sentencing—or in which the substance involved was a Schedule II drug (e.g., marihuana).

These alternative explanations for non-custodial outcomes were eliminated through the manual collection of additional information. This included whether an offender was in or out of custody at the time of sentencing and the specific substance to which the trafficking charge related. In terms of the former, an offender who has been held in custody is generally given credit for time served. This can complicate efforts to analyze sentencing patterns to the extent that these decisions are not transparent or clearly documented.⁴³⁹ Notably though, the review of offender custody status at the point

⁴³⁹ Since 2010, judges have been required to review the time served calculations made for the court record. See section 719; see also Bill C-25, *An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)*, 2nd Sess., 40th Parl., 2009, proclaimed into force on February 22, 2010. Short title - *Truth in Sentencing Act*, S.C. 2009, c.29. For added context see Doob & Webster, *supra* note 305(a).

of sentencing suggests that relatively few offenders are held in remand custody on drug trafficking offences. Of the 2017 files (181 cases), none of the offenders were in custody when sentenced. Of the 2011 files (555 cases), one of the offenders who received a suspended sentence (out of 55) was in custody; the estimate for the remaining (500) files was that approximately 6% (30/500) were in custody.⁴⁴⁰ In summary, time spent in custody awaiting sentencing can be largely disregarded as an alternative explanation for the non-institutional sentences in question.

However, the dramatic increase in the use of suspended sentences in the 2017 data could still be explained by the predominance of a Schedule II drug. In terms of this latter alternative explanation, sentences available (or required) under the *CDSA* are partially determined by the type of substance involved, as set out in a series of attached “Schedules.” The bulk of drug trafficking offences involve Schedules I and II substances. Schedule I includes the so-called “hard drugs” (e.g., heroin, cocaine, fentanyl); trafficking is an indictable offence, and the maximum penalty is life imprisonment. Schedule II includes cannabis/marihuana offences; trafficking is an indictable offence, but if the amount is less than three kilograms, then conditional sentences remain available. The distinctions are important in that trafficking offences involving marihuana could offer an alternative explanation for the imposition of suspended sentences post Bill C-10 for such charges.⁴⁴¹

In terms of the (28) files in which *conditional sentences* were imposed in 2017, most (19/28) involved trafficking in less than three kilograms of marihuana; six involved Schedule I substances with offence dates that pre-date November 2012 (Bill C-10); two were unavailable; and one involved a Schedule IV substance (hybrid). And so, the review confirmed that for at least 25 of the 28 cases reviewed, conditional sentences

While a notation of credit given is made when a custodial sentence is imposed, when a judge gives credit for time served that transforms a custodial sentence into a non-custodial one, the time served is generally referenced as a mitigating factor that is not otherwise documented. In the context of this project, time served could offer an “alternative explanation” for the imposition of what would otherwise be an overly lenient sentence for drug trafficking (suspending sentence).

⁴⁴⁰ To determine custody status for the 500 (2011) CSO files, it is important to note that a random sample of fifty (50) was drawn (every tenth file). Out of those 50, there were three in which the offender was in custody (3/50 or 6%). Extrapolating to the larger population produced the estimate that 30 out of 500 of the offenders were in custody at the time of sentencing.

⁴⁴¹ The file review regarding substance was limited to the (181) 2017 files. The 2011 files had been archived and were no longer readily accessible to court staff. They were not requested as the nature of the substance was most at issue for the 2017 orders.

remained available due to either the nature (and amount) of the substance involved, or to the fact that the offence occurred prior to the enactment of the Bill C-10 restrictions.

Of the 153 files in which sentence was suspended in 2017, most (125/153) involved Schedule I substances (e.g., heroin, cocaine, fentanyl). While 13 involved trafficking in marihuana, the amount alleged exceeded three kilograms, making the offence ineligible for a conditional sentence. For six files (three marihuana, three “GHB”), conditional sentences may have been available if the prosecutor elected to proceed summarily. For the remaining nine files, no substance information was available. In summary, fully 92.1% of the suspended sentence cases involved substances that precluded the imposition of a conditional sentence, essentially ruling out substance as an alternative explanation.

Optional conditions imposed

It is difficult to compare the *number* of optional conditions imposed over time for two reasons. First, conditional sentences have five mandatory conditions while probation orders have only three.⁴⁴² Second, there can be some variability in the pronouncement of sentence (i.e., the wording used). One judge might impose three conditions as follows: 1) you are not to consume alcohol; 2) you are not to consume drugs; and 3) you will take specified counselling. Another judge might combine the requirements into a single condition: 1) you are not to consume drugs or alcohol and you will take specified counselling.⁴⁴³

⁴⁴² Section 732.1(2) sets out the mandatory conditions for a probation order. Cases involving victims or witnesses are subject to an additional mandatory condition under s. 732.1(2) (a.1).

⁴⁴³ For example, one conditional sentence had a single condition that read: 1) You shall be inside your residence at all times except: (a) to go directly to, from and while at (i) appointments with a supervisor, counsellor, lawyer, doctor, dentist or other person as directed; (ii) work during times as directed; or (iii) for other reasons during times as directed; and (b) Saturdays from 10:00 a.m. to 2:00 p.m.; and, you shall (a) not consume or possess alcohol, illegal drugs or drug paraphernalia; (b) not have visitors after 10:00 p.m.; and (c) answer the door or telephone to the police or a Supervisor. You will be responsible for ensuring you hear the bell, knock or phone.

The Provincial Court (BC) has recently adopted standardized “picklists” for conditions relating to bail, probation, and conditional sentence orders. <https://www.provincialcourt.bc.ca/types-of-cases/criminal-and-youth/links#Q7>

With those caveats in mind, a comparison was done between optional conditions imposed for each of the two sanctions for 2011 and 2017.⁴⁴⁴ For conditional sentences, there were essentially no changes; the average order in both years included 11 optional conditions. Suspended sentences, on the other hand, did change. The average order in 2011 included six optional conditions; in 2017 the average order included nine.

In terms of the onerousness of optional conditions, there was a specific interest in tracking changes in the use of house arrest and/or curfews. In *Proulx*, the Supreme Court indicated that the imposition of such conditions was necessary for several reasons, including distinguishing conditional sentences from suspended sentences with probation.⁴⁴⁵ For this project, over 20 conditions or groups of conditions were coded. For the purpose of the 2011 to 2017 comparison, the focus was on the imposition of house arrest, curfews, and community work service requirements. As can be seen in Table 4-8 (below), in both 2011 and 2017 conditional sentences were likely to include either a curfew or house arrest requirement, or both. Notably, suspended sentences were more onerous in 2017; the percentage of orders including house arrest increased from 1.8% in 2011 to 9.2% in 2017. Curfews were also far more likely in the post Bill C-10 orders, increasing from 10.9% in 2011 to almost half (47.7%) in 2017.⁴⁴⁶

In terms of community work service (CWS), just over one-third of conditional sentences included such a requirement in each year; for suspended sentences this increased from 36.4% pre Bill C-10 to 60.1% post Bill C-10. The average number of hours required also changed; for conditional sentences, it dropped from 54 to 36 hours, while for suspended sentences it almost doubled, from 33 to 61 hours.

⁴⁴⁴ To make the two orders more comparable, conditions that were mandatory on conditional sentences (e.g., reporting and residency requirements) were tracked, but not counted, when imposed on probation orders.

⁴⁴⁵ *Proulx*, *supra* note 14 at para 36.

⁴⁴⁶ It was not uncommon to have a single order that included both house arrest and a curfew (generally with one following the other). When grouped to include *either* house arrest or a curfew, the punitive shift in suspended sentences remains. In 2011, only 12.7% of the orders included either house arrest or a curfew; in 2017 this increased to over half (51%).

Table 4-8 Conditional sentences vs suspended sentences – use of house arrest, curfew, and community work service (CWS)

	Suspended sentences (n=208)				Conditional sentences (n=528)			
	2011 (n=55)		2017 (n=153)		2011 (n=500)		2017 (n=28)	
	#	%	#	%	#	%	#	%
Report/reside	36	65.5%	142	92.8%	all*		all*	
House arrest	1	1.8%	14	9.2%	226	45.2%	15	51.7%
Curfew	6	10.9%	73	47.7%	362	72.4%	23	79.3%
CWS – yes/no	20	36.4%	92	60.1%	174	34.8%	10	34.5%
CWS – hours (avg.)	33		61		54		36	
Counselling	20	36.4%	112	73.2%	255	51.0%	14	48.3%
Abstain alcohol or drugs	15	27.3%	106	69.3%	406	81.2%	21	72.4%
Present self at door (monitoring)	2	3.6%	53	34.6%	261	52.2%	16	55.2%
No contact/no-go (area restriction)	10	18.2%	32	20.9%	113	22.6%	2	6.9%
Maintain employment or attend school	3	5.5%	24	15.7%	65	13.0%	0	
No weapons/knives	5	9.1%	34	22.2%	138	27.6%	8	27.6%

*Represents mandatory conditions under section 742.3.

In addition to the shifts noted above regarding conditions considered to be the most onerous, there were several other areas in which the post Bill C-10 suspended sentences changed. Notably, they included requirements that an offender report to a probation officer (increasing from 65.5% to 92.8%), attend counselling (increasing from 36.4% to 73.2%), abstain from the consumption of drugs or alcohol (increasing from 27.3% to 69.36%), and not be in possession of weapons or knives (increasing from 9.1% to 22.2%). In each of these instances, changes were noted in terms of the conditions imposed on suspended sentences, while those imposed on conditional sentences remained essentially unchanged (or slightly reduced).

Sentence length – conditional sentences vs suspended sentences

Conditional sentences were regularly imposed for drug trafficking prior to the Bill C-10 restrictions (e.g., 500 in 2011). Given that each of these conditional sentences would have required the judge to first decide that a term of imprisonment was necessary, the expectation was that post Bill C-10 we would see a sharp decline in the use of conditional sentences with a corresponding increase in the use of jail. More importantly, while we would expect the few remaining conditional sentences to get shorter (most

would involve trafficking in less than 3 kilograms of marihuana), suspended sentences should have been unaffected. In terms of sentence length, we see the expected decrease for conditional sentences (from a median of 270 days in 2011 to 180 days in 2017) but an unexpected increase for suspended sentences, whose length doubled from a median of 360 days in 2011 to a median of 730 days in 2017.

Summary of overview – BC court datasets

The data described above provide necessary context for the broader analysis. First, most of the adult criminal caseload continues to be summary offences. Second, conditional sentence utilization in BC stabilized between 2006 and 2012 at around 10% (of primary sentences imposed) but started dropping post Bill C-10, reaching a low of 6.4% in 2017 (the last year for which data were available). Notably, there was an obvious discontinuity in sentence patterns pre and post Bill C-10 that appears to be related to the restrictions placed on the use of conditional sentences. Indeed, as we saw fewer conditional sentences, we saw more prison terms, though they were substantially shorter and more often followed by probation. There was also a marked increase in the use of suspended sentences for drug trafficking offences post Bill C-10. A review of sentence patterns for this offence suggests that when conditional sentences were restricted, suspended sentences became longer and more onerous (i.e., more like conditional sentences). These findings will be revisited in more detail in the following chapters.

4.1.2 Survey and interview participants

4.1.2.1 Demographics

In terms of demographics, survey respondents were primarily full-time judges (80%) assigned to lower mainland regions (63%). Almost half (46%) had been sitting for ten years or less; 54% for more than ten years. Similarly, the judges who were interviewed were primarily full-time judges (79%) assigned to lower mainland regions (71%). Most (83%) of the interview participants were male judges and 17% were female. Interview participants were slightly more experienced as judges than the survey group; almost two-thirds (62%) had more than ten years sitting (see Table 4-9 for details).

Table 4-9 Survey and interview participants - status, region, years as a judge

	Survey participants (n=40)		Interview participants (n=24)	
Status (as of 2018):	Number	Percentage	Number	Percentage
Regular/full-time	32	80.0%	19	79.2%
Senior/part-time	4	10.0%	2	8.3%
Retired	4	10.0%	3	12.5%
Total	40		24	
Assigned region:				
Vancouver	14	35.0%	12	50.0%
Fraser	11	27.5%	5	20.8%
Interior	4	10.0%	2	8.3%
Vancouver Island	8	20.0%	4	16.7%
North	3	7.5%	1	4.2%
Total	40		24	
Years sitting as a judge:				
0 – 5	7	17.5%	4	16.7%
6 – 10	11	27.5%	5	20.8%
11-15	7	17.5%	5	20.8%
16 - 20	9	22.5%	5	20.8%
20 + years	6	15.0%	5	20.8%
Total	40		24	

In some ways, the judges in each group were proportionately representative of the larger BC judicial complement—for example, 80% of both the survey and interview judges were full-time, and 82% of the judicial complement was full-time (in 2018). In other ways, the groups diverged. For instance, 63% and 71%, respectively, of survey and interview participants were from lower mainland (geographic) regions while, at the time, only 54% of the court’s judicial complement was so assigned.⁴⁴⁷ Similarly, while the gender of survey participants was unknown, 83% of the judges interviewed were male, while only 56% of the overall complement in 2018 was male; females were notably under-represented.

4.1.2.2 Incorporating survey and interview responses

There are two caveats worth mentioning with respect to how the survey and interview responses were used. The first is an acknowledgment that many (but not all) of the judges interviewed also participated in the survey, meaning that there was an

⁴⁴⁷ *Provincial Court of BC Annual Report 2018/2019* (2019), at p. 31.
<https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2018-2019.pdf>

unknown level of overlap between the two groups.⁴⁴⁸ Put another way, there is no suggestion that the 24 judges interviewed were different from the 40 judges who participated in the survey. And so, on issues that include the presentation of responses from both groups, there may be cases in which the comments of one judge are captured twice—once as a survey respondent and then, again, as an interview participant.

It is also important to note that the judges who participated in the survey and interviews were a diverse group who held differing opinions on many issues. They did not speak with one voice and there were few topics on which all agreed. When presenting their responses, efforts were made (e.g., by coding in NVivo) to ensure that positions were fairly reflected. As is often the case in research projects that include qualitative data, however, choices were made in terms of identifying the themes that would be incorporated into the final product. Given that the focus of this thesis was on identifying factors related to the apparent failure of conditional sentences as tools of prison reduction, responses that spoke to this issue were elevated, sometimes at the expense of equally interesting responses that did not.

4.2 Thematic Analyses

4.2.1 Net-widening

The most substantive threat to the success of sanctions intended to replace imprisonment is that they will be used, instead, as alternatives to a more lenient response (e.g., probation). Indeed, prior to the 1996 enactment of Bill C-41, concerns around net-widening were repeatedly raised as part of the national debate regarding the risks of introducing a new non-custodial sanction. Nonetheless, the government persisted, codifying the principle of restraint, and creating a non-custodial form of imprisonment. Notably, these reforms were not accompanied by either of the mechanisms intended to provide principled direction to judges in terms of their practical

⁴⁴⁸ Some judges had been recruited through the survey and others volunteered this information during the interview. They were not otherwise asked, given the reassurances that they had been given in terms of the anonymity of the survey.

application—e.g., a sentencing commission or sentencing guidelines. As Doob (1990) noted:

In order to implement a policy of reduced use of imprisonment, two of the necessary conditions appear to be the enactment by Parliament of a coherent sentencing policy that endorses the use of community sanctions and a method of providing authoritative and unambiguous guidance on sentencing to judges.⁴⁴⁹

And so, it should come as no surprise that evaluations conducted twenty years after conditional sentences were introduced either reported disappointing results or were quick to raise net-widening as a likely explanation for the sanction's apparent failure as a tool for prison reduction. Reid and Roberts (2019), for instance, refer to the conditional sentence as a "parasitical sanction" that has been attached to the probation caseload in many cases.⁴⁵⁰ Similarly, Webster and Doob (2019) speak of judges using conditional sentences as more robust probation orders, suggesting that a non-trivial number of conditional sentences were imposed on offenders who would otherwise have been placed on probation.⁴⁵¹ The above-mentioned studies provide helpful context for this dissertation and its narrower focus. Indeed, through survey and interview responses, this study offers several new insights into the apparent ineffectiveness of conditional sentences as prison reduction strategies in BC.

To be clear, there is no suggestion that judges deliberately or even consciously decided to undermine parliamentary intent through the misapplication of conditional sentences. Indeed, most judges made it clear that regardless of their own perspectives, they use conditional sentences only in cases in which they have already decided a term of imprisonment is necessary. Notably, when asked whether, in their opinion, conditional sentences had reduced the number of offenders sent to custody in their court, all survey participants responded affirmatively.⁴⁵² However, given the broad sentencing ranges that have existed for most offences and the discretion traditionally granted to judges, it is

⁴⁴⁹ Doob, *supra* note 2 at p. 415.

⁴⁵⁰ Reid & Roberts, *supra* note 1 at p. 35.

⁴⁵¹ Webster & Doob, *supra* note 1 at p. 194.

⁴⁵² In the current survey, 28/40 (70%) of the survey participants indicated that conditional sentences had "definitely" reduced the number of offenders sent to custody in their court; 12/40 (30%) expressed only slightly less confidence, indicating that the sanction "probably" had that effect (Q#2).

possible, if not likely, that judges may have been unaware that their decisions sometimes acted to widen the net of penal control.

In addressing the net-widening phenomenon as it relates to conditional sentences, the following section will be broken down into three main areas. The first responds to the question “why did judges not use conditional sentences in place of prison?” This will include an exploration of several factors expected to influence whether judges saw (or accepted) conditional sentences as credible prison alternatives, including their construction, resourcing, and monitoring.

The second section also focuses on judicial perspectives, though instead of exploring the “push” (i.e., identifying the factors that weighed against their use in place of prison), it examines the “pull” and seeks to identify the factors that may have encouraged their use in place of probation. Finally, the third section examines the ways in which the guidance provided in *Proulx* may have unintentionally contributed to conditional sentences that acted to increase (not decrease) imprisonment rates.

4.2.1.1 *The push*

The literature suggests several possible explanations for judicial reluctance to use conditional sentences in place of traditional terms of imprisonment. At a conceptual level, these include concerns related to the sanction’s construction, skepticism in a non-custodial sanction’s ability to address deterrence and denunciation, and an awareness of public dissatisfaction with its use. At a pragmatic level, these challenges reflect concerns tied to the sanction’s “penal bite” and resourcing. Put another way, having a non-custodial sanction used as a form of “community imprisonment” requires both judicial confidence in the sanction and public acceptance of the sanction. These, in turn, are linked to appropriate “branding” and the provision of adequate funding. The punitiveness (or penal “bite”) of conditional sentences, after all, is tied to the inclusion of onerous conditions; implicit in this, is the assumption that such conditions are vigorously monitored and regularly enforced. The following sections explore these areas through the lens of judicial decision-making.

Conditional sentence construction as a legal fiction

As suggested earlier, the original sin of conditional sentencing may be in the decision to construct the sanction as an alternate form of imprisonment. This did little to promote public acceptance, especially with a public already sensitized to perceptions of leniency in sentencing,⁴⁵³ and arguably set the sanction up to fail by creating (punitive) expectations that it could not meet. Clearly, if conditional sentences are not accepted as some form of imprisonment, it is unlikely that they will be used as such.

And, in fact, several judges interviewed recalled having concerns when conditional sentences were first introduced. Indeed, of the 16 judges who spoke on this issue, most (11/16) recalled having a negative reaction. One judge remembers lawyers referring to conditional sentences as “pretend jail” (Judge P). Another reported that when conditional sentences were created, “I thought they were an intellectually dishonest probation order” (Judge N). Judge “I” had a similar response, wondering - “How can you call this jail? This is really probation, and it is really just probation being dressed up in different language.... You’re going to sentence him to jail but he’s not going to go to jail?.”

Judges were evenly split between those who reported accepting conditional sentences as a form of imprisonment, and those who did not.⁴⁵⁴ Notably, there were four factors repeatedly raised by those who took the position that conditional sentences are a form of jail (or are “jail-like”). The first was that the sanction is, quite literally, defined as a jail sentence – “that’s a jail sentence no matter how it looks to everybody else—by definition” (Judge F). Second, the order is punitive, with the routine inclusion of a curfew or house arrest providing penal “weight.” Third, the facilitated breach mechanisms promote compliance, and, finally, upon proven breach the offender can be ordered to serve the balance of the term in custody. As Judge F observed, “[a conditional sentence] has the teeth of a prison sentence because it’s considered a prison sentence. The bite comes down if the person breaches and you terminate.”

⁴⁵³ Marinos, V., & Doob, A. N. (1999). Understanding public attitudes toward conditional sentences of imprisonment. *Criminal Reports (5th)*, 21, 31–41.

⁴⁵⁴ Overall, 16 judges addressed the challenge of defining conditional sentences as terms of imprisonment; eight suggested conditional sentences are (or should be) seen as jail terms, and eight suggested they are not.

Several judges who accepted conditional sentences as prison terms nonetheless acknowledged the challenge of communicating that fact to the offender and to the public. One judge, for instance, made a practice of having offenders taken into custody in the courtroom and having them held in custody until the paperwork had been prepared, reviewed, and signed— “[it was] for the benefit of the public, I wanted them to understand it is a jail sentence. That was my way of getting at it. That’s a real concern” (Judge L). Another stressed the importance of explaining to offenders that they are being sentenced to a term of imprisonment notwithstanding the fact that it will be served in the community. “I want them to know that it’s not a beefed-up probation order; it’s a jail sentence. I’ll say that ‘This is a jail sentence but you’re getting the opportunity to serve it in the community.’ I want them to know the seriousness of it” (Judge E).

Notably, there was implicit recognition that a certain level of public support for (and confidence in) sentencing is necessary, and that getting the public to understand and accept the notion of imprisonment served “in the community” was particularly challenging. Indeed, there was a sense that the government had failed to educate or communicate effectively to the public at the time and had made little effort to “sell” the new sanction.⁴⁵⁵ As one interview participant noted with some frustration, “[f]rom the government’s perspective, they left the PR component to the judges. We did try to do some of that in the early part...[W]e tried to explain that it really was jail, but nobody was buying it” (Judge Y).

Judges who struggled with the notion of conditional sentences as terms of imprisonment spoke in terms of legal fictions and the amorphous nature of the sanction. Judge U, for instance, was concerned that a failure to treat breaches severely had resulted in conditional sentences becoming “a bit of a sham,” one that led to his or her belief that “some judges are misleading the public at the sentencing stage, when they sound like they’re doing something serious, but in reality, they’re not.” Several judges explicitly rejected the notion that there could be a meaningful equivalence between conditional sentences and terms of imprisonment. Judge C, for instance, offered the following:

⁴⁵⁵ On this point, see Roberts & Manson, *supra* note 381 at p. 19; McLellan, *supra* note 207 at p. 269; and Webster & Doob, *supra* note 1 at p. 193.

I appreciate that the law is that a conditional sentence is a jail sentence served in the community, but the reality of it is that it is served in the community. In my view, notwithstanding the actual law, there's a closer affinity between a conditional sentence and probationary sentences.

Similarly, as Judge G observed, "I don't see them generally being viewed as jail sentences, but rather as glorified suspended sentences with periods of probation." Two of the survey participants also addressed the fiction of conditional sentences as terms of imprisonment. One challenged the argument made by some defence counsel that a conditional sentence was no different than traditional jail - "If that were so, I often wondered why they always argued so strenuously for it" (Judge #33). The other questioned the ability of the appellate courts to provide guidance to lower court judges on this issue - "Higher courts continue to pretend that conditional sentences are somehow as much a form of punishment as jail. Nobody in the general public believes that. So long as higher courts continue with this highly suspect notion, they cannot give proper guidance" (Judge #14).

Judge W expressed discomfort at sentencing someone to essentially "spend their time at home watching television" and frustration that conditional sentences could not easily be ranked on a scale of sanctions. The judge explained that "one CSO could be below a suspended sentence in the hierarchy, and another could be as punitive as going to the penitentiary." Notwithstanding these concerns, Judge W saw value in conditional sentences, arguing that the legal fiction they represent is beneficial, justifiable, and "intellectually sustainable." This judge suggested that the true problem is that conditional sentences are not seen as being sufficiently punitive, arguing that "punishment means something specific and CSOs don't fit within that... [They] don't fit into our perception of punishment, even though we know that [they should]."

And so, much of the early legal debate focused on the sanction's unfortunate construction, and the implications that it had in terms of both public and judicial acceptance. The extent to which judges were unable to see conditional sentences as any form of imprisonment likely informed, as we would expect, their use of the sanction in cases in which they viewed imprisonment as the appropriate (and necessary) response. Indeed, this was particularly evident in discussions of the ability of conditional sentences to adequately address the sentencing objectives of denunciation and deterrence.

Deterrence and denunciation

In *Proulx*, the Court implicitly recognized that conditional sentences could only succeed as measures of prison reduction if they were able to satisfy (at least in some cases) the sentencing objectives of deterrence and denunciation. Indeed, early research drew attention to judicial skepticism in this area. In the 1998 National Survey, judges were asked whether a conditional sentence could be as effective as imprisonment in achieving various sentencing objectives: denunciation, deterrence, rehabilitation, reparation, and proportionality. While almost three-quarters (71.7%; n=449) indicated that conditional sentences were “always” or “usually” as effective as imprisonment in achieving rehabilitation, only approximately one-third of the respondents believed this was true for the objectives of denunciation (35.3%) or deterrence (34.7%).⁴⁵⁶

When comparing the 1998 and 2018 results for BC judges, we see positive shifts on every objective measured. Specifically, most judges (over 60%) in the current survey indicated that conditional sentences “always” or “usually” can be as effective as a regular sentence of imprisonment in achieving rehabilitation (92.5%) and reparations (65.8%). Further, 67.5% indicated that they can “always” or “usually” craft orders that represent proportionate responses. Notably, the largest shifts observed were in relation to the objectives of denunciation and deterrence. In 1998, only one-quarter of the BC judges had confidence in a conditional sentence’s ability to address denunciation; in 2018 over one-half responded positively on that measure (53.8%). A similar increase is noted in terms of deterrence, with slightly over one-third indicating that a conditional sentence could “always” or “usually” address this objective in 1998, as compared to 60% in 2018 (see Table 4-10 below).

Notwithstanding the increased confidence expressed by some judges in the ability of conditional sentences to address deterrence and denunciation, some skepticism remained. Indeed, in the current survey (2018), 40% of the judges indicated that conditional sentences were only “sometimes,” “almost never,” or “never” as effective as imprisonment in achieving deterrence; 46.1% responded similarly regarding denunciation. And so, despite the increased confidence most judges expressed in the sanction’s ability to address deterrence and denunciation, a considerable number

⁴⁵⁶ *Roberts, et al., supra* note 13 at p.6.

remained unconvinced.⁴⁵⁷ It would be reasonable to assume that judges who held such beliefs would be less likely than others to impose a conditional sentence in place of a term of imprisonment in a case in which they had concluded that deterrence and denunciation were primary considerations.

Table 4-10 BC survey results - 1998 vs 2018 - sentencing objectives

Response to: "A CSO can be as effective as imprisonment in achieving..."										
BC only	Denunciation		Deterrence		Rehabilitation		Reparation		Proportionality	
	1998	2018	1998	2018	1998	2018	1998	2018	1998	2018
always/usually	25.5%	53.8%	35.3%	60.0%	70.0%	92.5%	44.9%	65.8%	47.1%	67.5%
sometimes	33.3%	28.2%	39.2%	32.5%	26.0%	7.5%	42.9%	23.7%	35.3%	27.5%
almost never/never	41.2%	17.9%	25.5%	7.5%	4.0%	0.0%	12.2%	10.5%	17.6%	5.0%
Total	100% n=51	100% n=39	100% n=51	100% n=40	100% n=50	100% n=40	100% n=49	100% n=38	100% n=51	100% n=40

During the interviews, judges were asked to comment on the apparent increase in expressed confidence in the sanction's ability to deter and denounce. Most (20/24) participants suggested that *Proulx* was the primary factor in this shift.⁴⁵⁸ Indeed, several judges saw the court's endorsement of the sanction's ability to address denunciation and deterrence as a turning point. Until then, one participant noted, judges were reluctant to use conditional sentences for serious offences; once the court said that they do (or can) have a denunciatory and deterrent effect, that changed (Judge X). As Judge O explained, "*Proulx* was a jumping off point... [telling us conditional sentences] should be used a lot more often than they were back then." For some, the decision also addressed concerns about the relative leniency of conditional sentences. For example, one judge noted that "*Proulx* gave [s.742.1] a little bit of muscle. It was the best thing to happen to

⁴⁵⁷ Of the judges who commented on the ability of conditional sentences to achieve denunciation and deterrence objectives in the interview, several (5/21) saw them as being no better than suspended sentences. While 3/5 suggested that neither order would be effective, two believed that, to the extent a non-custodial outcome can satisfy these objectives, they were equally able to do so. As Judge C explained, "I think it's all a shell game to be honest."

⁴⁵⁸ Of the four judges who did not respond to this question, two were retired, one was relatively new, and one ran out of time.

conditional sentencing as far as I was concerned. It just took away that perception that we all had, that this is a walk for any accused” (Judge I).

Notably, for many judges their stated belief that conditional sentences could address denunciation and deterrence appeared to be rooted in the Supreme Court’s declaration to that effect. As one judge observed, “[judges] will talk about that—that a CSO does provide the necessary denunciation and deterrence required to satisfy the sentencing principles. I don’t think that a CSO was thought about that way as much [before *Proulx*]” (Judge O). A second judge framed it this way: “[The *Proulx* decision] made it very clear that CSOs can have a denunciatory and deterrent effect. That’s why we use them instead of jail, because the Supreme Court of Canada said they have that effect...*Proulx* gave CSOs more teeth” (Judge K). Finally, another judge noted that “the Supreme Court of Canada tells us that conditional sentence orders have a deterrent and denunciatory aspect to them—I guess we’re supposed to listen to them” (Judge T). For these judges, *Proulx* provides authority on the issue of deterrence and denunciation, giving them the language that they need for cases in which they want to use a conditional sentence. What it does not necessarily do, however, is increase the likelihood that a judge will genuinely believe that a non-custodial outcome is appropriate and/or would satisfy these (generally more punitive) objectives.

Indeed, it is important to note that there is a difference between an authentically held belief in the ability of conditional sentences to deter and denounce, and one that is the product of jurisprudence (e.g., *Proulx*). Put another way, many judges take it on faith (or doctrine). After all, it is not as if the Supreme Court relied upon a body of research to make an informed, evidence-based finding that the sanction could, in fact, act to deter future offending and adequately denounce behaviour. On the contrary, it seems that the Court simply decided that the sanction would have this impact and, in doing so, implicitly directed lower court judges to accept this determination, or at least to act as if they do.

And so, we see many judges parroting the rhetoric of *Proulx* (e.g., focusing on the sanction’s punitive nature or its enhanced “teeth” or “bite”) in an apparent effort to convince the public of its truth and, at times, perhaps to convince even themselves. In terms of faith in the ability of conditional sentences to effectively deter and denounce, Judge U suggested that this became more important after the Court in *Proulx* clarified that the sanction could be applied to all offences. As he/she explained, “When you do

use [CSOs] on a serious case—I don't know if a sales job is the right word—but you're persuading the public that you're doing the right thing, so you include words like that.”

Alternatively, regardless of their opinion, some judges may feel the need to be seen to adopt (or at least accept) this belief for the benefit of appellate courts. In the context of the increased focus on (and faith in) the ability of conditional sentences to deter and denounce, Judge B offered these thoughts:

So, it doesn't surprise me at all that we focus more on [deterrence and denunciation]. The really interesting thing to me is that we say those words in part because I think the Court of Appeal has been very clear in many cases that there are certain—I won't call them magic words—but there are certain terms of art that at least if you say them, the Court of Appeal can't say you didn't turn your mind to them.

Notably, as part of its reconstruction of conditional sentences as punitive sanctions capable of addressing deterrence and denunciation, the Court in *Proulx* repeatedly emphasized the need for community resources, including those necessary for adequate monitoring and supervision of offenders. On this issue, Lamer, C.J.C. adopted the language used by the Alberta Court of Appeal in *Brady* – “A conditional sentence drafted in the abstract without knowledge of what actual supervision and institutions and programs are available and suitable for this offender is often worse than tokenism; it is a sham.”⁴⁵⁹

Indeed, to the extent that judges do not believe that conditional sentences are adequately resourced, vigorously monitored, and regularly enforced, they are unlikely to accept them as terms of imprisonment or genuinely believe that they can satisfy deterrence and denunciation, regardless of what they may say. This offers some explanation for the finding that, while perhaps used more often for some serious charges, we did not see a substantial increase in the use of conditional sentences (and corresponding decrease in the use of imprisonment) post-*Proulx*. Arguably, the decision resuscitated the sanction but was unable to get it off life support.

⁴⁵⁹ *Proulx*, *supra* note 14 at para 73 (quoting from *Brady*, *supra* note 228 at para 135).

Resources and monitoring

Adequate resourcing is relevant in terms of both offender support and supervision in the community. The following section explores resourcing as it relates specifically to the (punitive) use of curfews and house arrest, and the use of optional conditions to create conditional sentences that approach the penal equivalency of the jail term being replaced. Such conditions can create tension between the obvious need for resourcing and the recognition that program funding through provincial governments has been an issue since conditional sentences were introduced. While perhaps not determinative on its own, the failure to provide (or apply) adequate resources can be seen as the “last straw” for frustrated judges that were already concerned that neither the public nor the offender were viewing conditional sentences as penal equivalencies.

Curfews & house arrest – “has to have some teeth”

The survey asked judges how often they included house arrest or curfew conditions when imposing conditional sentences. Of the 40 responding judges, all but one (97.5%) indicated that they include house arrest or curfew conditions “often or always.” Given its importance, this issue was further explored in the interviews. Framed more broadly, judges were asked whether they had developed optional conditions that they tended to impose on conditional sentences. Responses left little doubt that BC judges had incorporated the use of curfews and house arrest conditions when crafting conditional sentences. Almost all (22/23) mentioned that they generally or always include such conditions on their orders, though they were much more likely to impose curfews than house arrest.⁴⁶⁰

For some judges, restrictive conditions were clearly intended to make the orders more punitive *for the offenders*. Judge G, for instance, stressed the importance of conditional sentences holding “weight”, saying - “yes, always a curfew. There has to be some bite to them.” The idea that conditional sentences should inflict some level of pain was echoed by Judge P, who stressed the sanction’s punitive nature, saying that “it has

⁴⁶⁰ Two judges provided estimates of their relative usage of house arrest: one said 25% of the time (Judge P); the other said 30% of the time (Judge F).

to have some teeth.” For other judges, curfews and house arrest also send a message to *the public* that this is real punishment (Judge N). As Judge J noted, for instance:

I will sometimes impose a 24-hour house arrest other than being out to obtain the necessities of life or for a medical emergency. Again, I think that’s part of the court’s role to communicate to the community that this is jail in the community; they can’t be wandering the streets.

The issue of resources came up repeatedly in survey responses. When asked if they would use conditional sentences more frequently if there were more community and/or supervisory resources provided, most judges (35/40) responded “yes.” When asked what more is needed, the most frequently given responses (33/55) related to supportive resources (e.g., treatment and training programs).⁴⁶¹ Approximately one-quarter (25.5%) of the responses called attention to the need for additional supervisory resources to ensure effective monitoring and enforcement of the orders (see Table 4-11 below).

Table 4-11 Survey responses - "what more is needed?" (Q#10)

Response to "what more is needed?"	Frequency	Percentage
alcohol & drug treatment, mental health, counselling	25	45.5%
supervision & enforcement (including electronic monitoring)	14	25.5%
probation staff to support & supervise	5	9.1%
native cultural programs/ skills training programs	4	7.3%
housing	4	7.3%
other	3	5.5%
Total 35 judges *	55	100.0%

*Judges provided multiple responses (35 judges provided 55 responses)

⁴⁶¹ Concern regarding the perceived lack of supportive resources was expressed with considerable specificity and often revolved around mental health and housing issues. As one judge argued, “we need considerably more resources for housing, mental health, addictions, education, job searches and training and personal skills training” (Judge #16). In terms of supportive resources and the decision to impose a conditional sentence, several judges connected housing to conditional sentences. As one judge noted, “[a lack of] housing is a huge barrier to sentencing an offender to a conditional sentence” (Judge #24). Another observed that “the availability of stable and supportive housing should not dictate whether one person [who has housing already] gets a CSO and another does not” (Judge #36).

Several judges expressed frustration regarding the lack of quality programs generally, and the almost complete lack of supportive programming in smaller or remote court locations.

Supervision – “They are ‘jail’ sentences after all”

When asked to identify the main challenges of conditional sentencing in an open-ended survey question, 19% (11/58) of the issues identified related to a lack of resources for offender monitoring and supervision.⁴⁶² The interviews did not follow up on the resource issue specifically, though several judges raised it in the course of other responses. Some judges expressed concerns regarding the ability of local probation offices to deal with the volume. Judge S, for instance, questioned whether offenders were being churned through the system – “we’re sending so many people there that you kind of wonder how intense their resources are and how much support they can provide.” Another suggested that “the poor staff on the corrections side who are trying to deal with this are so overworked it’s next to impossible for them to actually monitor this sort of stuff” (Judge L).

Notably, Judge L reported rarely using conditional sentences, in part due to the lack of resources provided for offender supervision in the community:

I was very cynical from the beginning, that there would be adequate resources put in place to make this work. As it turned out my cynicism was borne out....We were going through the motions and very quickly that fell away as there were no resources put in place to do anything other than have the order signed and sent out. So, my cynicism with the operation of this is that a judge takes a great deal of effort to contrive these conditions and build it and nobody does a thing with it afterwards. As a result, I’d rather just put them in jail.

Judge L’s response (above) speaks directly to one explanation for the sanction’s failure in terms of prison reduction—specifically, that some judges refused to use conditional sentences due to perceptions that the orders were not sufficiently resourced or actively monitored. Notably, this perception also spoke indirectly to the issue of net-widening. Indeed, one could argue that judges who used conditional sentences notwithstanding such concerns were not viewing the sanction as “prison-like” at all. If that were the case, one must wonder whether the orders represented diversions from custody, or from another non-custodial option.

⁴⁶² Multiple responses were counted, resulting in a total that is greater than 40 (Q#16).

Electronic monitoring

In terms of concerns regarding levels of supervision, many survey responses (8/14) focused on the need for more modern electronic monitoring technology to ensure compliance with curfews and house arrest conditions. Other judges wanted consistent and frequent home visits, something they did not believe was occurring. As Judge #33 explained, “often, I found that supervision and curfew checks, for example, were virtually non-existent. Most breaches were discovered only when the offender was apprehended for committing another crime” (Judge #33).

It is notable that while approximately one-quarter of the survey responses referenced the need for more resources for offender supervision and monitoring, when asked whether they order electronic monitoring of curfew or house arrest conditions, almost three quarters (29/39; 74.4%) responded “no or never.” When asked why they do not include electronic monitoring, the most common response was that it was not available in their area due to insufficient resources (16/45; 35.6%); others said they did not know whether it was available or that it had not been requested by counsel (11/45; 24.4%).⁴⁶³ Several responses pointed to the technological requirement for a landline that many offenders cannot satisfy (15.6%) while others did not feel the technology was reliable (8.9%). Notably, four judges essentially took the position expressed by this judge – “If I cannot trust the offender to follow a curfew [without electronic monitoring] then he or she should not be on a CSO” (Judge #7).

The practice of imposing curfews or house arrest conditions *without* electronic monitoring is consistent with statistics collected by BC Corrections that reflect a low (and decreasing) utilization of electronic monitoring overall.⁴⁶⁴

- 2009/2010 – 172 electronic monitoring cases

⁴⁶³ Multiple responses were coded on the “why not” question; the 29 judges who said “no/never” provided 45 responses.

⁴⁶⁴ These electronic monitoring utilization statistics include cases in which offenders are monitored on bail, conditional sentences, probation, and parole. As such, no denominator is provided as the focus was on the use of electronic monitoring equipment overall.

Source: Sierra Systems. (2014). *Report to British Columbia Justice and Public Safety Sector: Technical assessment of electronic supervision (Final report)*, at p. 24.
<https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/corrections/reports-publications/bc-corrections-technical-assessment-of-electronic-supervision.pdf>

- 2011/2012 – 119 electronic monitoring cases
- 2013/2014 – 75 electronic monitoring cases

Given that these counts include electronic monitoring ordered on bail, conditional sentences, probation, and parole, it is difficult to assess changes relating specifically to any single type of order. Put another way, while the reduction is consistent with a post Bill C-10 reduction in the use of conditional sentences, it is just as likely a reflection of fewer crimes or an overall judicial frustration with the availability or technological requirements of the electronic monitoring program at that time. Regardless, the important point is that judges were not using the program regularly. The significance of this finding is more obvious when examining the use of electronic monitoring relative to the number of offenders subject to conditional sentences.

Between 2014 and 2018, only 1.1% (123/11,417)⁴⁶⁵ of conditional sentences included electronic monitoring, although it is not clear what percentage of conditional sentences included either a house arrest or curfew requirement.⁴⁶⁶ On the one hand, when speaking of potential explanations for the failure of conditional sentences to achieve meaningful prison reduction, one could argue that if a judge is not inclined to ensure active monitoring of core conditions, it is unlikely that he or she would have otherwise imposed a custodial sentence. On the other hand, the lack of enforcement also threatens public perceptions of the sanction's legitimacy. Whether the conditional sentence represents a true diversion from custody, or not, is immaterial. Judges must

⁴⁶⁵ Source: Data prepared by PREv Unit, BC Corrections, May 2019.

⁴⁶⁶ It is worth noting that many of the obstacles to using electronic monitoring have arguably been addressed within the last two years. BC Corrections has shifted from outdated technology that required that the offender have a landline, to new Global Positioning System (GPS) technology that does not. Aside from increasing eligibility for the program, the current system gives correctional staff the ability to ensure that offenders are where they should be at any given time (e.g., in their home); it can also inform staff of instances when offenders are where they should not be (e.g., within a restricted “no go” area). Source: Ministry of Public Safety and Solicitor General. (2017). *A Profile of BC Corrections: Reduce Reoffending, Protect Communities—2017*, at p. 6. Retrieved from Ministry of Public Safety and Solicitor General website: <https://www2.gov.bc.ca/assets/gov/law-crime-and-justice/criminal-justice/corrections/reports-publications/bc-corrections-profile.pdf>

Survey judges reported only recently becoming aware of the availability and facilitated requirements of this equipment; several suggested that they would be more likely to order electronic monitoring in the future as a result.

frame the sentence as some form of imprisonment, and it is difficult to support the penal equivalency argument if the conditions restricting an offender's liberty are not monitored.

Penal equivalencies – “they shouldn’t be drinking gin and tonics”

Post *Proulx* efforts to craft conditional sentences that approached the penal equivalencies of custody were most obvious when they involved the use of curfew and house arrest requirements, or conditions requiring offenders to abstain from the consumption of drugs and/or alcohol (unrelated to the offence). Of the 16 judges who spoke on this issue, most (12/16) indicated that they include abstinence conditions specifically for the purpose of mimicking conditions of confinement. As one judge explained: “I usually require that they not consume alcohol or drugs...because I’m seeing it as a punitive sentence. You’re not supposed to be having fun on it” (Judge P). Judge F expressed a similar sentiment, saying “it’s a prison sentence so they shouldn’t be drinking gin and tonics” (Judge F).

Several judges reported being concerned that the public may see offenders enjoying themselves while on a conditional sentence. This was reflected in the comments made by Judge R, for instance, who said: “Generally, right across the board we almost always will put in house arrest and curfews.... if we let offenders out to party and play 24/7 then how is that similar to jail?” Indeed, optional conditions were used by some judges, not only to service the (offender-focused) objectives of sentencing, but also the broader (community-focused) purpose of promoting respect for the law. As Judge U explained:

I think I have to try to replicate as much as possible the jail sentence in the community. That includes a curfew or house arrest, it includes no alcohol or drugs. I don’t care if you are an addict, you’re technically not allowed to do drugs or alcohol in jail, and I think it would be a sham to the public to say that I’m jailing this person in the community, but they’re allowed to consume drugs and alcohol.

Judges who reported including abstention conditions only in cases in which that was relevant to the offence tended to rely on curfew or house arrest requirements for punitive bite. As Judge N pointed out, “[the Crown] is worried that the public will see the conditional sentence as a slap on the wrist and they want to ‘up’ the optics of it.” Judge W was similarly disinclined to layer abstention requirements on top of periods of house arrest, indicating that it was the confinement itself that acted as punishment:

I don't like treating people like they are a four-year-old and mommy and daddy say you're grounded for a week and you can't watch TV. If the guy wants to sit at home and drink beer all day long, okay fine. As long as they're not out breaking into somebody's house and as long as you feel the effect of the CSO. Sure, I describe it as watching TV, but he's home and he doesn't like it.

In addition to Judge W's comments regarding offenders essentially being sentenced to "watch TV," two judges raised concerns around the inclusion of house arrest or curfew conditions. Judge Y questioned the discretionary nature of such conditions, asking rhetorically, "If you're going to say this is a jail sentence, then why wouldn't the house arrest portion be both mandatory and enforced?" The second judge (Judge N) challenged the equity of house arrest in terms of impact and eligibility:

The bad side is that there's a world of difference between serving a conditional sentence order, which typically has a house arrest component, if you're living in the British Properties or if you're living in an apartment in a slum. For a lot of people that have the same cluster of problems that might attract you to give that conditional sentence order, they tend not to qualify if they don't have a residence, or even if their living situation is marginal.

On this point, Roberts (2004) suggests that while it would be inequitable to deny conditional sentences to either wealthy or homeless offenders, a possible solution could involve having both serve their sentences in a residential halfway house.⁴⁶⁷

Suspended vs conditional sentences – meaningful distinctions for the offender?

In addition to concerns that conditional sentences are not objectively "jail-like," there were also issues raised around the subjective experience of offenders. Of the 10 judges who raised this during the interviews, most (7/10) indicated that they do not believe offenders necessarily make a distinction in their own minds between a suspended or conditional sentence. Relying on their experiences both as counsel and as judges, they spoke of offenders as being more focused on the "bottom line" impacts of an order, not on its label. As Judge O observed, "if you're looking at it from the offender's viewpoint, at the end of the day all they care about is 'am I going to jail or am I not?'" Another judge (Judge I) went so far as to extend the issue to pre-conviction release orders as well, saying:

⁴⁶⁷ Roberts, *supra* note 172 at p. 166.

If they can't go to the park and they can't stay out past eight, they don't care if you call it an undertaking or a recognizance or a CSO. All they know is that they can't stay out past eight o'clock.

Notably, several judges (3/10) suggested that some offenders in certain circumstances can be made aware of the distinction between orders. What was important for them was the delivery of the message from the bench. As Judge G explained, for instance, "I try to make that distinction. I will say things like 'you understand this is a jail term in the community and if you come back before me on a breach, I'm not going to be happy—you're likely to do some jail time so don't breach.'" Judge J was unsure how often offenders or the public really understood the difference between a conditional sentence and a suspended sentence: "I think a lot of it depends upon what is said in the context of a particular sentencing hearing to hopefully drive home to the offender why they're being given a conditional sentence rather than a suspended sentence or real jail."

The challenge of appropriate messaging in the context of conditional sentencing is that we have yet to settle on a consistent vocabulary. When describing conditional sentences, many judges speak of jail terms served in the community, which can be confusing enough. Counsel (and some judges) will contrast conditional sentences of imprisonment with jail that is described as being "real," "institutional," "traditional," or "custodial." Judge "I" reported blanching whenever crown or defence talk about a conditional sentence as not being real jail, saying:

I always make a point of saying jail in a correctional institution or incarceration in a correctional institution, as opposed to incarceration in the community. I always try to make that distinction—not 'real' jail. *Proulx* says it is real; it's just the location that is different.

Again, for many judges, it is the consequences of non-compliance that distinguishes suspended and conditional sentences in the offender's eyes. As one judge explained, "I say that to the offender: 'this is not a probation order—you're going to go to jail if you breach this.' I want them to know that it should have a greater impact on them [than probation]" (Judge E). Judge G took a similar position, observing that "[offenders] know that they're going to be arrested and in jail, not released on a breach charge; they will be in jail." The challenge, of course, in defining a sanction based on the penalty for non-compliance, is that it fails to provide a rationale with which to distinguish the impact of the order on the compliant offender. Indeed, it is unclear how either a compliant

offender, or a non-compliant offender who is not subject to breach proceedings (e.g., due to a lack of monitoring) would experience a conditional sentence as being more onerous than a probation (or bail) order with the same terms.

And so, we continue searching for a narrative that might explain why conditional sentences performed so poorly in terms of prison reduction. The preceding review of the ‘push’ factors tells at least part of the story. Specifically, when conditional sentences were introduced, judges were unclear as to how the sanction should be used. In the wake of *Proulx*, however, many made genuine efforts to use conditional sentences as prison alternatives. We see this in the sanction’s application to more serious offences and in individual judges’ attempts to craft orders that are more clearly punitive and, notionally at least, closer to penal equivalences. The challenges of doing so were almost immediately apparent and included public (and offender) perceptions of the sanction as lenient, resource limitations that impacted offender monitoring, statutory construction issues (e.g., “not jail”), and in some cases, the judge’s own skepticism relating to the sanction’s ability to achieve certain sentencing objectives.

As a result, when judges say that they use conditional sentences as a true prison alternative, it is probably true in limited and select cases (i.e., in exceptional circumstances). Nonetheless, while this offers a partial explanation for the sanction’s disappointing performance in terms of prison reduction, it does not provide a complete picture. The narrative of conditional sentencing involves more than just a low utilization rate for otherwise prison-bound offenders. It is a tale of two sanctions—or at least of one sanction used two different ways. After all, the success of conditional sentences requires not only that they be used in place of actual imprisonment, but equally that they not be used in place of other non-custodial options. As noted earlier, the sanction’s construction contributes to this challenge by creating a non-custodial option that looks like (and may be experienced as) a more easily enforced form of suspended sentence (i.e., robust probation).

4.2.1.2 *The pull*

The preceding section considered “push” factors—those that may discourage judges from using conditional sentences in place of traditional terms of imprisonment. The following section approaches the issue from the other perspective by focusing on “pull” factors—those considerations that may encourage judges to use conditional

sentences in place of probation. These include challenges involved in enforcing suspended sentences, adequately distinguishing between suspended and conditional sentences, and the prioritization of arguably unrealistic (utilitarian) sentencing objectives. Bottoms' notion of judges acting under a "special deterrent" theory of sentencing (as opposed to a focus on prison reduction) will form part of this analysis.

Suspended sentences – "we have no credibility at all"

The enforcement mechanism for a suspended sentence envisions offenders being brought back to court to be sentenced if convicted of further offences, including a breach of the probation order, during the term of the suspension.⁴⁶⁸ As noted earlier, these revocation procedures are seen by many as ineffective and have been, in fact, rarely used (see 2.1.2.1). This is relevant to the net-widening discussion in that judicial frustration with the flawed enforcement mechanism of the suspended sentence could make conditional sentences, with their facilitated breach provisions, that much more appealing.

The ineffectiveness of the suspended sentence was reflected in the results obtained in this study. It was clear, for instance, from both the interview and survey responses, that applications to revoke suspended sentences have never occurred with any frequency in BC. Of the 24 judges interviewed, three-quarters (18/24) indicated that they had literally never seen an application to revoke a suspended sentence; the remaining six said they had seen maybe one or two over the course of their entire career (either as counsel or as a judge). Judge T's response was typical - "I've never had a revocation application on a suspended sentence—as a judge or as defence counsel. It has never happened." Similarly, of the survey judges who addressed this issue, most (14/24) had never seen one; 10 reported having seen one or two. As one judge noted, "suspended sentences are never returned to court; when there is a breach, the accused is just charged with a breach instead, whereas CSO breaches come back to us and we can take more immediate and effective action" (Judge #21). A similar sentiment was expressed by Judge #20 who stated that "[i]t's a joke really since a suspended sentence is never enforced as such if breached." Finally, Judge S asked, "where's the deterrence if there isn't really any risk of the sentence being imposed if they're not following it?"

⁴⁶⁸ Section 732.2(5)(d).

Notably, the judges who did recall having dealt with the odd revocation application stated that most had occurred within the last two years. As Judge F recalled, “I’ve had two where they’ve applied to have a suspended sentence lifted and I imposed conventional jail sentences.... [They were] drug cases. So, [the prosecutor was] unhappy that I imposed a suspended sentence but didn’t want to appeal.” Judge X’s experience was similar: “I’ve only experienced a revocation of a suspended sentence on a federal matter. It was a fentanyl trafficking, and the person received the ‘exceptional circumstances’ suspended sentence and then didn’t comply in a substantive way.”

As suggested earlier, the historical practice of not pursuing applications to revoke suspended sentences has implications in terms of the creation of conditional sentences. As one judge observed:

A very experienced criminal court judge [from the BC Supreme Court], now retired, once commented to me in a parking lot conversation that if the Crown would only have used the revocation provisions for suspended sentences in the way that Parliament had intended, we wouldn’t have needed conditional sentences! (Judge #18)

The suggestion that conditional sentences were needed because suspended sentences were not easily enforced is consistent with judges using the former as more robust probation, rather than in place of custodial sentences. Indeed, Judge W spoke of the value of the conditional sentence relative not to prison but, rather, to the suspended sentence:

Now we could impose conditions that were probably more meaningful, that if you don’t do what you’re supposed to do there’s an immediate remedy. That is not the case with a suspended sentence with probation. [The conditional sentence] made sense in that it was a carrot and a stick.

Judge C also linked conditional sentences to the enforcement issues of suspended sentences, explaining that “[CSOs] sent a stronger message.” Indeed, this judge echoed others who held the opinion that conditional sentences would not have been needed had the revocation provisions of the suspended sentence been remedied:

Conditional sentences, in my view were unnecessary when they were brought in, but we did need to have a regime for the enforcement of suspended sentences, in terms of revoking them. That didn’t exist, at least not in BC.

While judges were not asked explicitly to comment on the incidence of net-widening, 19 judges raised the issue in some way while responding to other questions or clarifying earlier answers. Of these, most (14/19) reported being aware that there are some judges who use conditional sentences in place of other non-custodial options, though most were quick to point out that they do not do so themselves. As Judge O observed, for instance, “[t]he first thing you have to decide if you’re going to impose a CSO is whether a jail sentence is necessary. I think that’s a step a lot [of judges] miss.” A similar sentiment was shared by Judge P, who noted that “what happened before [Bill C-10] was that judges were using CSOs when they should have been using suspended sentences or a probationary sentence; they were over-used.” Finally, Judge A spoke of judges who were treating conditional sentences as “the new suspended sentence in a lot of cases, just because it had a lot more teeth.”

In contrast with the suspended sentence, the breach provisions established for conditional sentences were generally considered to be both effective and efficient. Indeed, their respective enforcement mechanisms were often cited as one of the primary distinguishing features between suspended and conditional sentences. Overall, the judges interviewed tended to speak favourably of the conditional sentence breach provisions, describing them as both timely and rarely contested.⁴⁶⁹ Notably, having the offender before the court quickly was thought to give the judge the opportunity to actively manage the offender in the community. There was also a sense, rightly or wrongly, that police and probation officers were more likely to monitor and enforce conditional sentences, and that prosecutors were more likely to actively pursue breach allegations.

Several (9) of the judges interviewed referenced the “Sword of Damocles” metaphor when discussing the enhanced enforceability of conditional sentences. Judge B, for instance, advised that he or she would often give “the Sword of Damocles lecture”, advising offenders that should they fail to comply, “the first position the crown is going to take is that you should be in prison.” Importantly, Judge W contrasted the conditional

⁴⁶⁹ Of the 21 judges who commented on the breach provisions, 12 reported positive experiences. Of the nine judges who raised concerns, 4/9 related to confusion around the process, 3/9 spoke of offenders serving less or more time than they should, one was concerned that other judges did not treat breaches seriously, and one felt that the provisions could be hard—on the judge. In terms of the latter issue, Judge L explained that the policy of having offenders who breached appearing before the original sentencing judge felt like punishment (for the judge) – “it’s like cleaning up your own mess. That didn’t feel right—that we should be singling [judges] out for punishment because they’d made the wrong sentencing decision, but we did.”

sentence breach provisions with the revocation procedures set out for suspended sentences, saying:

You can put a review on a probation order but there's no Sword of Damocles hanging over their head. When they come back on a CSO they know damn well they could go in—not with a suspended sentence. On a suspended sentence we have no credibility at all.

Similarly, Judge S spoke of the enhanced enforceability of conditional sentences, noting that with suspended sentences the sentence is rarely imposed: “There’s some case law that refers to the Sword of Damocles hanging over your head [on suspended sentences]—really? It’s kind of a dull sword.” Finally, Judge K described “the beauty of [a CSO] is if they breach the conditions, they have to come back before you or another judge, so there’s a nice deterrent effect hanging over them all the time.”

Prioritizing utilitarian sentencing objectives

Following the language used in *Proulx*, judges also distinguished suspended and conditional sentences according to their nature (punitive versus rehabilitative) and their ability to promote specific sentencing objectives. Indeed, another way of approaching the net-widening issue is to examine the primary purpose for which the sanction is used. In the case of conditional sentences, this could include a focus on reducing the number of offenders sentenced to jail, referred to by Bottoms (1981) as the *avoiding prison theory*. It could also include providing a community-based (rehabilitative) sanction with a more effective breach mechanism, something described by Bottoms as the *special deterrent theory*.⁴⁷⁰ As discussed earlier, these goals have been embedded in the judicial rhetoric around conditional sentences since their introduction.

Bottoms (1981) applied this analysis in his review of the English suspended sentence, a sanction conceptually like our conditional sentence.⁴⁷¹ In terms of the British experience, Bottoms argued that it was the inappropriate use of the suspended sentence that defeated the purpose behind the legislation, though he suggested that “there is

⁴⁷⁰ Conditional sentences, according to this theory, are more effective than suspended sentences in terms of rehabilitation because offenders are more likely to comply with treatment or counselling requirements, and in terms of individual deterrence, because the consequences of re-offending or non-compliance are known, swift, and (arguably) certain, as opposed to the more uncertain and delayed consequences of a breach of probation.

⁴⁷¹ Bottoms, *supra* note 191.

nothing illogical or inconsistent in holding both theories together. One can argue that both are appropriate, but for different types of offender.”⁴⁷² Problems arise, however, when legislation focuses on one justification (avoiding prison) and fails to anticipate the appeal of the other (special deterrent). This is especially problematic in the case of the Canadian conditional sentence since the conditions lend themselves to traditional utilitarian aims, and their definition as terms of imprisonment allows judges to feel that they are being punitive, yet humane at the same time.

To the extent that Canadian judges have operated under a special deterrent theory, drawn to using conditional sentences as robust probation, the official intent to reduce prison populations is undermined. The following section explores this implicit form of net-widening through an analysis informed by Bottoms’ special deterrent theory. Specific attention is paid to two interview questions. The first asked judges to identify what they saw as the goals of conditional sentencing (Q#1); the second asked judges what metrics they thought might be relevant to an assessment of the sanction’s effectiveness (Q# 2).

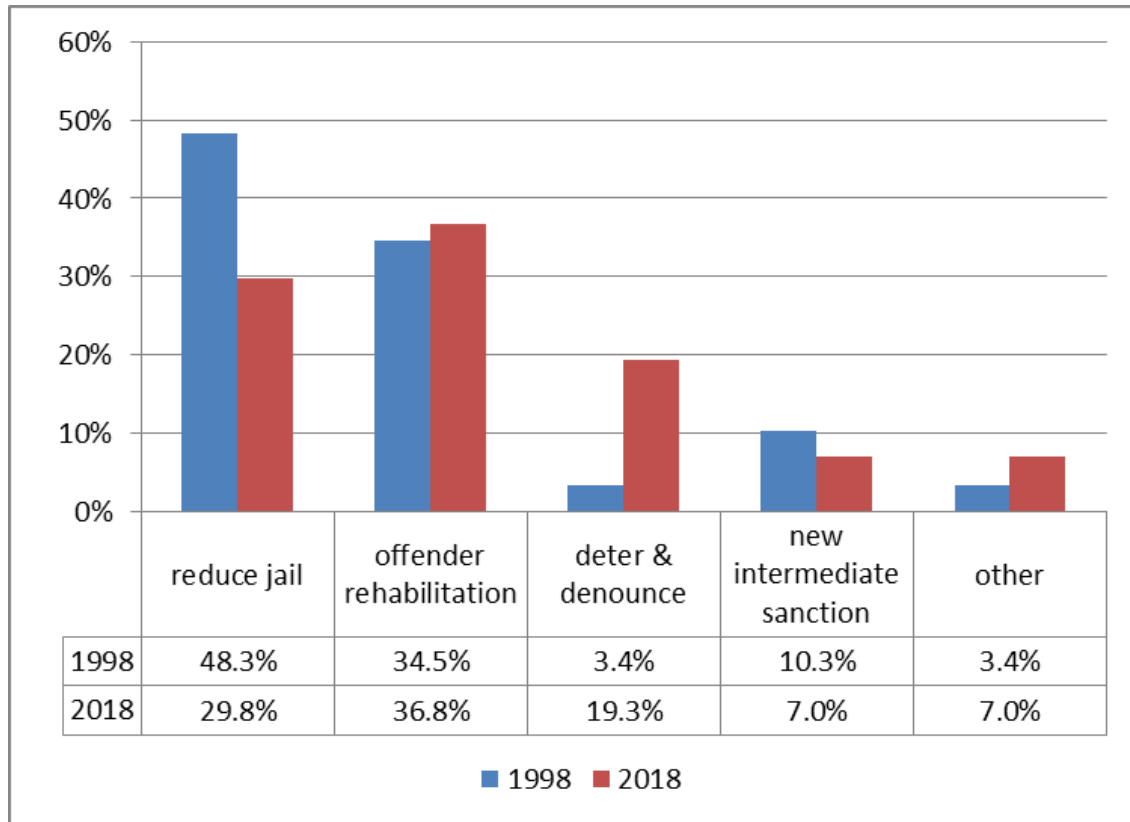
Conditional sentences were thought to incorporate multiple goals. Indeed, most of the judges interviewed (21/24) spoke of the sanction’s prison reduction goals,⁴⁷³ and all (24/24) mentioned traditional crime reduction (utilitarian) objectives—that is, those related to offender deterrence, rehabilitation, and reintegration. Responses provided through the survey were consistent in that the bulk of goals identified (56.1%) related to utilitarian concerns. While prison reduction was regularly mentioned (representing 29.8% of responses), it did not appear to be the priority. Notably, this pattern represented a

⁴⁷² *Ibid* at p.3.

⁴⁷³ The primary advantages of conditional sentences were generally framed as maintaining the positive aspects of keeping an offender in the community or avoiding the negative aspects of holding an offender in prison, which are essentially two sides of the same “jail is bad” coin. In that sense, their responses reflected the rhetoric of restraint, especially the belief that incarceration is inherently harmful and, accordingly, should be avoided whenever possible. Judge R spoke of the negative impact that imprisonment has on offenders, their families, and the community, saying, “prison often makes people worse than when they go in.” Judge A expressed a similar sentiment, noting that “[prisons are] basically boarding school for crooks and those become their friends when they get out.” Several judges spoke of prisons as being expensive institutions with no redeeming values—describing them, for instance, as a “warehousing concept that grows from hopelessness” (Judge D).

clear shift from the responses given by BC judges as part of the 1998 survey, in which prison reduction was the primary objective most often identified (see Figure 4-6).

Figure 4-6 BC survey results – 1998 (n=58) vs 2018 (n=57) - primary objective of conditional sentencing (Q#1) ⁴⁷⁴



And so, the conditional sentence has evolved, from being a sanction initially targeting prison reduction, to one with broader, arguably conflicting objectives, including crime reduction. In the current project, the prioritization of utilitarian objectives became clear when judges were asked what metrics they thought would be relevant in an assessment of the effectiveness of conditional sentencing. Given the clear grounding of

⁴⁷⁴ Though the question asked for a single objective, some judges provided more than one and, in such cases, both were coded. The 1998 survey included 58 responses from 51 judges; the current (2018) survey included 57 responses from 40 judges. To make responses comparable, the 2018 responses were coded using the 20 coding options generated for the 1998 responses. Once coded, the 20 options were collapsed into five categories (as above) based on the primary focus of each. And so, for instance, responses coded as either “reduce imprisonment”, “reduce imprisonment of non-violent offenders”, “reduce negative effects of imprisonment”, “keep low risk offenders out of jail”, “more cost effective than prison”, or “save jail for worst offenders”, were re-coded into the group code of “focus on prison reduction.”

conditional sentences in the rhetoric of restraint, it was expected that most would include some measure of prison reduction or evidence that offenders were in fact being diverted from what would otherwise have been prison sentences. Notably, for most of the judges interviewed (21/ 24), the primary focus was on short and long-term recidivism measures; only three judges initially mentioned measures related to prison reduction, though an additional nine judges—when prompted—agreed that this latter response might also be a relevant metric.⁴⁷⁵

Recidivism – “It’s intended to help you...to change your life”

Most of the judges interviewed identified recidivism as a relevant metric for assessing the effectiveness of conditional sentence orders. Some, like Judge F, focused on short term impacts - “you’re going to want to look at recidivism. What’s the rate of offending while on a CSO? What’s the rate of breaching while on a CSO?” Judge G was similarly focused on the term of the order, saying, “I would want to see how many people are completing without incident....I look more at the short-term goal that they’ve successfully completed the order and they look like they’re on the right path.” Other judges looked for longer term change, suggesting that the real test is whether behaviour changes when the order is over, and the offender has the liberty to make good and bad choices (Judge T).

Many of the responses suggest support for the use of conditional sentences as special deterrents. Judge B, for instance, suggested that “if you impose a conditional sentence order and the person never comes back before the court system again, then that’s been a successful result.” Equating success with law-abidingness was also evident in the response of Judge E, who took the position that both breaches and future offending should be part of any evaluation. Similarly, Judge S stated that “if they go on to reoffend, then you have to really question whether or not the deterrent part of it has been given voice by the CSO.”

⁴⁷⁵ While most (9/12) agreed that prison reduction would be a possible metric, several (3/12) saw it as being irrelevant to an assessment of the sanction’s effectiveness. In terms of the minority position, one judge indicated that information regarding prison admissions may be influential at the bail stage but is not relevant at the sentencing stage (Judge U). Another saw the appropriate focus as being on the enhanced rehabilitation opportunities available in the community, regardless of what may be happening in the prison population (Judge J).

Of the judges interviewed, two indicated that they did not view recidivism as a relevant consideration when assessing the effectiveness of conditional sentences. One took the position that the prosecution of breaches could be seen as evidence of the effectiveness of the order in that it suggests that conditions are monitored and failures to comply are being enforced (Judge W). This view is consistent with Bottoms' avoiding prison theory in which the focus is on having the offender serve the term of imprisonment in the community under tight controls. If that is the goal in at least some cases, then evidence of monitoring and enforcement can be seen as signs that the order is effectively controlling the offender's behaviour outside of a prison environment.

The second judge, perhaps the lone strict retributivist within the group, took the position that a judge's task was to assess a proportionate sentence tailored to what the offender did, not to craft a sentence designed to affect what the offender might do in the future. As this judge (Judge C) explained:

You always hope that people will commit less crime or no crime, but I don't think that's a particular goal of mine in imposing any sentence. The sentence is tailored to what the offender did. Proportionality for me is the biggest—the most important consideration. The sentencing objectives—deterrence, denunciation, rehabilitation, reparations, etcetera—those are objectives, one or more, you can hope to achieve...You're not sentencing the offender for being a bad person. So, I don't know that [recidivism] really factors into it that much for me.

This is quite a contrast to the position taken by Judge O, who provided the following response:

Everything that we do is with the hope that it will reduce the offending behaviour. That's not just for the community, that's also for the individual themselves. I try to explain that quite often. To say, 'you may look at this as punishment, but it's intended to help you with your life—to change your life.'

On its face, incorporating utilitarian objectives into the goals of conditional sentencing is not necessarily problematic. Indeed, even when this includes drawing offenders up into a more severe sanction designed to promote greater compliance, it could be argued that this represents benevolent net-mending (of the ineffective suspended sentence) rather than malevolent net-widening. Reid and Roberts (2019), for instance, argue that government should pay attention when the courts use sanctions in unexpected ways. Notably, they suggest that judges may use conditional sentences in

place of probation due to insufficient funding for the latter. Indeed, they go so far as to frame net-widening as “an understandable judicial reaction to an inadequately resourced community sanction.”⁴⁷⁶

Notwithstanding good intentions, there is a dark side to up-tariffing sentences in order to impose one with more effective compliance mechanisms. Put another way, when dealing with an offender who would not otherwise be incarcerated, even an order that is designed to enhance his or her motivation to make positive life changes (e.g., requiring abstinence, a curfew, or an area restriction), can result in an offender’s incarceration if (or when) strict compliance is not possible. Indeed, it could be argued that offenders must be protected against such measures, even when imposed for their “own good.” This is particularly the case in light of the guidance provided by the SCC in *Proulx*.

4.2.1.3 ‘The Proulx’

Proulx had multiple impacts on conditional sentencing in Canada. In the short-term, the decision arguably salvaged a sanction that was struggling to find a niche. It did so by providing judges with a methodology for the application of conditional sentences and by re-constructing the sanction as an intermediate sanction capable of achieving sentencing objectives that had, up until then, generally been associated primarily with custodial outcomes (i.e., denunciation and deterrence). In the longer term, however, the guidance provided by the high court arguably resulted in the diminishment of conditional sentences (via the restrictions imposed by Bill C-10). More importantly, the court’s decision may have acted to reduce the sanction’s effectiveness as a mechanism for prison reduction.

In terms of *Proulx*’s contribution to the diminishment of conditional sentences, precisely by confirming that the sanction was available for all offences that met the limited statutory requirements, the Court enabled its use for the types of serious offences that would eventually lead to resistance from various Attorneys General, victim advocacy groups, and the public (see 2.3.2). Ultimately, the politicization of this issue resulted in most serious offences becoming ineligible for conditional sentencing. While this would have limited the sanction’s ability to reduce the use of imprisonment in any meaningful

⁴⁷⁶ Reid & Roberts, *supra* note 1 at p. 35.

way, there were two additional aspects of *Proulx* that arguably had similar, or greater, impacts.

Conditional sentences as the “do-it-all” sanction

When initially introduced, conditional sentences were grounded in the rhetoric of restraint. Prisons were framed as expensive and inhumane, and offenders, having lost their jobs, relationships, and ties to the community, were thought to come out more likely to reoffend, not less. Within this model, conditional sentences would reduce the use of traditional imprisonment, thereby saving money, treating offenders more humanely, and avoiding the negative (criminogenic) influences generally associated with incarceration. The goal was straightforward and realistic. As Martinson (1974) so astutely observed decades earlier, “if we can’t do more for (and to) offenders, at least we can safely do less.”⁴⁷⁷

The decision in *Proulx* complicated this objective by framing conditional sentences as sanctions capable of achieving both prison reduction and crime reduction objectives. Perhaps more importantly, in doing so it failed to anticipate the appeal (or impact) of the latter. As discussed in the preceding section, the elevation of utilitarian objectives may have indirectly supported the use of conditional sentences as a form of enforceable probation and encouraged judges to impose onerous conditions under the guise of offender rehabilitation. Both practices are problematic in terms of prison reduction.

Specifically, the use of conditional sentences for offenders that would not otherwise have been imprisoned (net-widening) can increase the use of imprisonment in several ways. The first, and most obvious, is that non-compliance with conditions can result in the incarceration of an offender who likely would not have been taken into custody otherwise. In that sense, the pursuit of utilitarian objectives (e.g., rehabilitation) can be problematic, especially when judges are sentencing marginalized offenders who may not have many supports, or offenders who may be dealing with poverty, homelessness, mental health and/or addiction challenges. Judges may be tempted to use conditional sentences for such populations, believing that the orders allow for more effective offender management in the community or that more resources will be made

⁴⁷⁷ Martinson, *supra* note 84 at p. 48.

available—in short, for the offender’s own good. Notwithstanding decades of research that suggests limited positive impacts of rehabilitative programming, judges appear to remain committed to such objectives. Indeed, as noted earlier, many judges suggested that the effectiveness of conditional sentences should be evaluated based on reductions in recidivism, as opposed to reductions in the use of imprisonment.

Notably, many judges implicitly endorsed the view that offenders could be “fixed” through the imposition of sentences designed to address specific risks and needs. In such a scenario, conditional sentences were particularly well-suited to the task. As Judge “I” explained,

How better to achieve the aim of sentencing? The protection of society, respect for the law—how better to do that than to change somebody from being a problem to being a law-abiding stable individual? That’s where CSOs kick in.

Of course, the danger of using criminal sanctions to effect positive change, especially when dealing with high-needs populations (e.g., homeless, drug-addicted, etc.), is that they may not be able to comply with the more onerous requirements of a conditional sentence. It may not be realistic, for instance, to require that such an offender abstain absolutely from the consumption of drugs, comply with a strict curfew, or stay out of a defined area of the city. Ruby (1999) foreshadows this issue when speaking of prison alternatives that become “traps” for users, saying:

The criminal law is applied with disproportionate efficiency to those who have inadequate social abilities, skills, and opportunities.... In this way, use of the conditional sentence may well lead to an increase in overall imprisonment because its conditions will not be kept.⁴⁷⁸

Conditional sentences that are longer and stronger (more punitive)

In *Proulx*, the Court directed judges to make conditional sentences longer than the prison terms they replace and to include onerous (punitive) conditions, including curfews and house arrest. Having endorsed these longer and stronger conditional sentences, the Court went on to suggest that adequate resources must be available for offender monitoring, and that proven breaches should be met with incarceration. These measures were necessary, the Court explained, to distinguish conditional sentences

⁴⁷⁸ Ruby, *supra* note 411 at p. viii.

from suspended sentences with probation, promote the objectives of denunciation and deterrence, and ensure that offenders do not avoid punishment.⁴⁷⁹

And so, in attempting to resolve one problem (the relative leniency of conditional sentences), the Court may have created another. After all, any effort to understand the relationship between conditional sentences and the use of imprisonment must, logically, include some consideration of the extent to which these initially non-custodial orders may become custodial orders. In the context of conditional sentencing, this transition occurs when an offender commits a new offence or fails to comply with a condition imposed. Indeed, by making the orders longer (with no remission time granted) and including additional (onerous) conditions, the likelihood that one of these situations will arise is increased.⁴⁸⁰

Breaches that convert conditional sentences from non-custodial to custodial orders can be problematic whether net-widening occurs or not. In cases in which the order represented a true diversion from traditional imprisonment, this will depend on at what point in the sentence the breach occurs, and the degree to which the conditional sentence was extended (beyond the prison term that would have otherwise been imposed). It is possible, as Judge A noted, that an offender could end up serving more time than he/she would have, had a straight prison sentence been imposed to start with:

[If] they breach up front, what are you going to do? Are you going to ask them to serve the rest of that time in custody, when the crown was originally asking for a third of what they got on the CSO?⁴⁸¹

In cases in which conditional sentences are used in place of another non-custodial option (net-widening), the risk of increasing the use of prison is more obvious. To the extent that onerous and punitive conditions are included and tightly monitored,

⁴⁷⁹ *Proulx*, *supra* note 14 at paras 35-39. These measures also reflected the perceived relative leniency of conditional sentences and were consistent with efforts to recreate the sanction as penal equivalencies to the prison terms that they replaced.

⁴⁸⁰ In a study of Vancouver courts, the authors suggest that “the number of conditions and the length of the orders are the most significant predictors of breaches whether it is at bail, probation or in conditional sentence orders.” Sylvestre, et al., *supra* note 347 at p. 53.

⁴⁸¹ As a remedy to this paradox, one judge recommended that judges adopt the practice of specifying the prison term they would have imposed at the time when placing an offender on a conditional sentence. It should be noted, however, that this would arguably transform conditional sentences into sanctions in which a jail term is imposed but then suspended (sometimes referenced as a “true” suspended sentence).

breaches will be more likely. If conditional sentences are lengthened, and if proven breaches regularly result in the orders being terminated, admissions to custody will increase. Indeed, if the intention is to keep an offender out of prison, judges must be thoughtful when crafting conditional sentences—making them tough, but not too tough, and long, but not too long. *Proulx* provided no clear guidance in these areas, nor did it anticipate the impact of non-compliance with longer and stronger orders, especially when associated with up-tariffed conditional sentences.

4.2.2 Up-tariffing

Well-intentioned reforms too often act to bring a greater number of individuals into the criminal justice system, widening the net of social control. Notably, the concept of net-widening can take many forms. At the front-end (intake), it can be seen when police process formal charges so that an offender can gain access to programming or resources that would not be available if, for instance, no charges had been laid. At the back-end (outcome), we can see net-widening when tighter controls (e.g., electronic monitoring) are applied at the parole stage. In the context of conditional sentences, net-widening has been framed as the application of a more severe sanction (the conditional sentence) in place, not of prison, but of a less severe sanction—for instance, a suspended sentence with probation.

Given the statutory requirements of section 742.1, if a judge wishes to impose a conditional sentence, he or she must first declare that the offence requires a sentence of imprisonment. When doing so for an offence that would not have otherwise been subject to imprisonment, the judge is effectively “up-tariffing” the sentence—perhaps ironically increasing the severity of the required response in order that a more effective (though less severe) sanction can be imposed. Again, while this may represent net-mending, it potentially frustrates efforts to reduce the use of imprisonment in several ways.

In addition to the primary concern—that offenders who were not facing imprisonment may be subject to incarceration while on longer and stronger conditional sentences, there are two additional, though perhaps more subtle, consequences of sentence up-tariffing. One relates to the impact (on future sentences) of having a conditional sentence of imprisonment on an offender’s criminal record. The other arises

when the up-tariffed option (e.g., conditional sentence) effectively recalibrates the sentencing range for a given offence.

Conditional sentences and the issue of escalation

When an offender appears repeatedly before the court, especially for the same or a similar offence, there is a tendency to impose progressively more severe sentences. While not intended to re-punish for past offences, a moderate increase in penalty recognizes that past sentences have been insufficient in deterring the offender.⁴⁸² In that sense, having a criminal record that includes a conditional sentence can impact (i.e., escalate) future sentences should that offender be back before the court.⁴⁸³ Indeed, in some instances it may take the possibility of receiving a non-custodial option off the table. While offenders (and some defence counsel) may not always take that into consideration, judges certainly do. As Judge O explained,

If there is a conditional sentence order made for say six months, and I see that on a record, I'll look at that and think, that was a six-month jail sentence that he was allowed to do in the community, but it was a jail sentence...I take that into consideration.

To the extent that a record reflecting a conditional sentence (as opposed to a suspended sentence) may influence a judge dealing with a subsequent offence to impose a custodial term, the use of imprisonment may be increased. While perhaps not immediately obvious, this occurrence could be seen as a “downstream” impact of up-tariffing.

The recalibration of sentence ranges

Up-tariffing, in the context of conditional sentences, involves net-widening that effectively increases the punishment threshold for a given offence. Notably, this is not necessarily an issue in terms of *prison reduction* as long as the more severe (up-tariffed)

⁴⁸² The practice of progressively (but moderately) increasing penalties for the same offence is referenced in the jurisprudence as the “step-up” or “jump” principle. See, for example: *R. v. Kory*, 2009 BCCA 146 at paras 6-7 or *R. v. Calliou*, 2019 ABCA 365, at para 8.

⁴⁸³ The legal implications of being sentenced to a conditional sentence (of imprisonment) can be nuanced. In *R. v. Tran*, 2017 SCC 5, the Court held that conditional sentences are not “terms of imprisonment” for the purpose of defining “serious criminality” under s. 36(1)(a) of the *Immigration and Refugee Protection Act*. Offenders serving conditional sentences also do not earn remission time (*R. v. Talman*, 2005 BCCA 279). And finally, a conditional sentence cannot be imposed intermittently or as default time for non-payment of a fine (*R. v. Wu*, (2003) 3 SCR 530 (SCC)).

penalty remains both non-custodial and available.⁴⁸⁴ Put another way, in the absence of non-compliance (breaches), up-tariffed conditional sentences were not overly problematic in terms of imprisonment rates until legislative restrictions were imposed that made them unavailable for specific offences. Having established that imprisonment (conditional or traditional) was required for a given offence (e.g., drug trafficking), judges were left in an awkward position when access to the less severe option was blocked. As Webster and Doob (2019) observed, while the introduction of conditional sentences may not have reduced the use of imprisonment, the “functional removal” of the sanction may have increased it. They offered the following speculative (but plausible) explanation for such an outcome:

[T]he removal of [conditional sentences] *may* have left a void that has potentially been filled by prison. Rather than return to suspended sentences for cases which had been previously “up-tariffed” to conditional sentences, some judges may have simply upgraded them to prison.⁴⁸⁵

In summary, up-tariffing can be viewed as yet another unintended consequence of the introduction of the conditional sentence. While clearly related to net-widening—as a by-product of this initial phenomenon through its escalation of severity of subsequent criminal sanctions as well as its recalibration of sentence ranges—it has its own independent effect that extends beyond the simple substitution of a suspended sentence for a conditional sentence of imprisonment. Arguably though, up-tariffing’s impact on imprisonment rates has been considerably more limited than that resulting from net-widening. Indeed, its dependence on the commission of subsequent offences (opening up the possibility of sentence escalation) or the occurrence of non-compliance with conditions linked to the conditional sentence (and the need to respond to such breaches) narrows its scope of impact.

And so, the enactment of sentencing restrictions contained in Bill C-10 (2012) had both expected and unexpected impacts. Notably in terms of sentencing, much of the focus at the time was on the introduction of additional mandatory minimum sentences and the restrictions imposed on the use of conditional sentences. Much in the same way

⁴⁸⁴ This is not to say that up-tariffing is benign for the compliant offender. Notionally, at least, that offender must deal with the stigma of a sentence of imprisonment, and downstream consequences of having such a sentence on his or her record.

⁴⁸⁵ Webster & Doob, *supra* note 1 at pp. 194-195.

as Bill C-41 failed to deliver anticipated *reductions* in the use of imprisonment, Bill C-10, with its tough-on-crime rhetoric, did not result in substantial increases. Put another way, whether conditional sentences acted to reduce prison rates, or not, removing them (for many offences) was expected to increase the use of traditional imprisonment, which it does not appear to have done in any meaningful way. Judges had, after all, established conditional sentences of imprisonment as appropriate responses for many indictable offences. That these did not all transition into comparable custodial outcomes post Bill C-10 was...unexpected.

Within this context, up-tariffing provides an intriguing bridge between net-widening and other powerful—albeit arguably equally unforeseen—phenomena that have emerged in response to the introduction of conditional sentencing. While no doubt the result of a complex interaction of factors, the following section explores possible explanations for the continued stability in imprisonment rates that was evident even after restrictions on the use of conditional sentences had been imposed. Perhaps the most provocative of them is the notion that judges may have employed resistance techniques (consistent with restraint) to circumvent what were seen as unduly harsh penalties.

4.2.3 Circumvention

Like net-widening, circumvention can occur at various points in the criminal justice process. In the context of sentencing, it generally involves strategies by which judges find ways to get around legislative intent. Critics of such practices argue that circumvention fails to recognize the role of government in establishing sentence policy and is inconsistent, therefore, with notions of parliamentary supremacy. Others have framed judicial resistance as efforts that are legitimate and, in many cases, completely predictable. Paciocco (2015), for instance, suggests the latter when he speaks approvingly of judicial efforts to embrace strategies within the rule of law that allow them to apply the law in ways that reduce perceived unfairness:

This [manipulation of the law] can aptly be demonstrated by examining the way that courts have worked to ensure that the square pegs of [restrictive] sentencing provisions fit within the round holes of the law. That can only be

achieved, it seems, by shaving the peg or widening the hole, and the preference of judges is to shave the peg.⁴⁸⁶

The practice of finding ways to resist reforms seen as being either unfair or unduly harsh is consistent with the principle of restraint, and best understood within the framework provided by the circumvention literature. And so, in addressing this issue as it relates to conditional sentences, the following section is broken down into two main areas. The first section presents results from this study in its exploration of circumvention as it relates specifically to the restrictions introduced by Bill C-10. This will include a review of the politicization of sentence policy and of judicial efforts to find ways around the unavailability of conditional sentences for certain offences. The second section discusses the implications of enabling jurisprudence that has emerged from the British Columbia Court of Appeal on this issue.

4.2.3.1 Judicial response to Bill C-10: The evidence

The restrictions introduced in 2012 were generally unpopular with judges⁴⁸⁷ and we should perhaps not be surprised that some found ways to work around them. In the current study, the most obvious examples of this approach came from cases in which judges chose instead to suspend sentence and place an offender on probation. Notably, there were also reports of judges imposing short jail sentences with probation (including intermittent terms), to reclaim some form of middle ground. In terms of the themes most often associated with such efforts, they included resistance to what was seen as the politicization of sentence policy, the challenge of dealing with marginalized or otherwise disadvantaged offenders, and an interest in maintaining (or recreating) a non-custodial

⁴⁸⁶ Paciocco, D. M. (2015). The law of minimum sentences: Judicial responses and responsibilities. *Canadian Criminal Law Review*, 19 (March), 173-229, at p. 207.

⁴⁸⁷ Judges were asked how their utilization of conditional sentences was impacted by the restrictions introduced in 2012 (Q# 20). Of the 38 judges who responded, the majority (22/38; 57.9%) indicated that they impose fewer conditional sentences. Interview participants also tended to report that their use of conditional sentences had decreased, with most viewing this trend as a negative development (14/18).

Notably, several judges (4/18) mentioned having reduced their use of conditional sentences prior to the introduction of restrictions. These judges attributed their reluctance to use the sanction to negative experiences—e.g., an offender who committed a serious offence while on a conditional sentence, high breach rates, or the realization that the orders were not being enforced or supported. As Judge Y explained, “over the years, I became less willing to pretend that, optically speaking, it was going to achieve general deterrence or the general aims of sentencing.”

option for offences that may have been unintentionally recalibrated as offences requiring imprisonment.

The search for circumvention

The single charge dataset created as part of this study allowed for the analysis of sentence trends by offence. This was important given that the bulk of sentences in adult criminal courts are imposed on summary offences that were not impacted by the restrictions introduced by either Bill C-9 or Bill C-10. Selecting offences that were eligible for conditional sentences prior to the legislated restrictions, but ineligible after their enactment, provides a valuable window into the judicial response to the narrowing of their discretion.

Analysis of the specific offences identified focused on two areas. First, it examined sentencing patterns over time (2006 to 2017), testing the conventional belief that pre Bill C-10 conditional sentences would be replaced by terms of imprisonment post Bill C-10. The second focus was on a pre/post comparison of conditional sentences and traditional terms of imprisonment in terms of sentence length and the inclusion of probation.⁴⁸⁸ For the purposes of these analyses, the three specific offences selected were: 1) aggravated assault; 2) theft over \$5,000; and 3) drug trafficking.⁴⁸⁹

Aggravated assault (s. 268)

The offence of aggravated assault was selected because it was expected to be impacted by both of the legislative restrictions introduced.⁴⁹⁰ The Bill C-9 standard of serious personal injury offence was almost certainly met,⁴⁹¹ and it was clearly captured

⁴⁸⁸ These variables were of interest considering recent research that suggests that the introduction of MMPs resulted in long conditional sentences being replaced by short custodial sentences, often to be served intermittently. Benedet, *supra* note 310 at p. 311.

⁴⁸⁹ For a review of selection criteria, see the methodology section—Table 3-4.

⁴⁹⁰ Initially, assault causing bodily harm was also included. This offence was excluded when it became clear that it was capturing charges in which the prosecutor had proceeded summarily, and conditional sentences remained available.

⁴⁹¹ According to s.752, “serious personal injury offence” includes:

(a) an indictable offence, other than high treason, treason, first degree murder or second degree murder, involving

(i) the use or attempted use of violence against another person, or

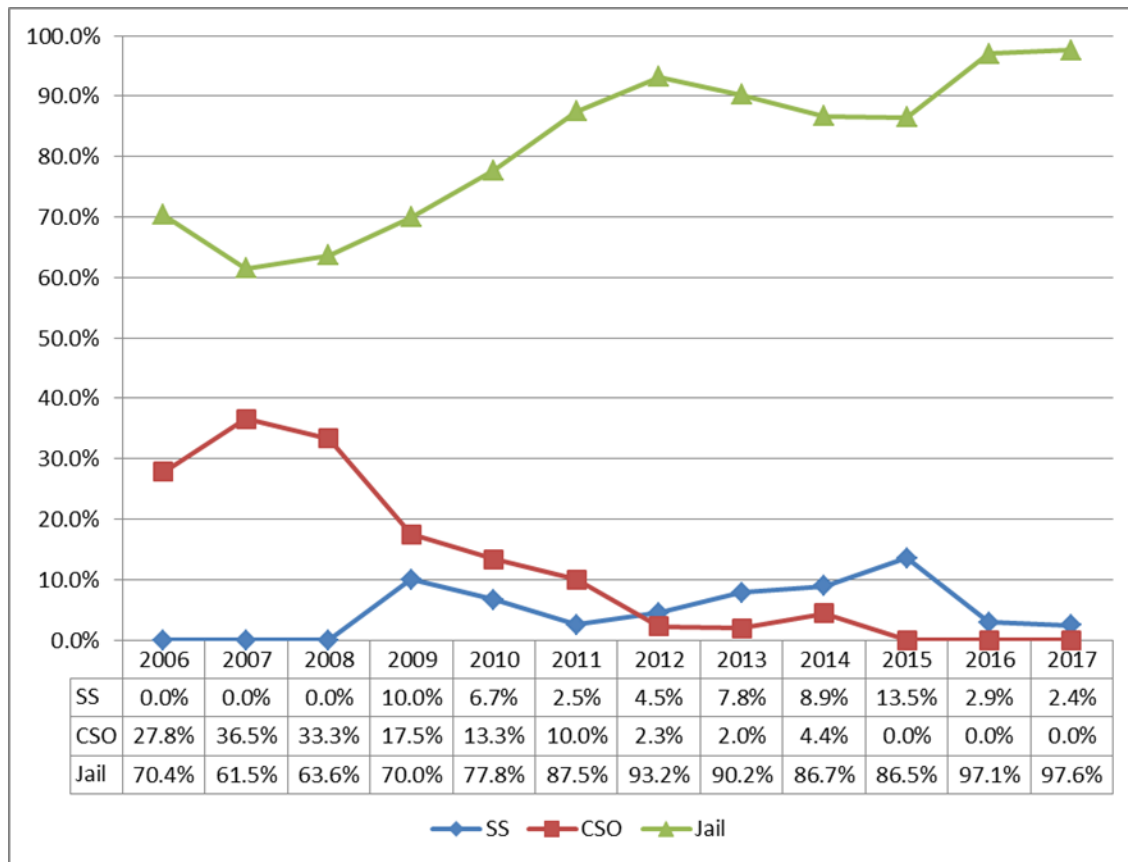
by the broader Bill C-10 amendments. Notably, given that the maximum sentence for this offence is 14 years imprisonment, the discharge provisions did not apply. Dataset 1, which excluded all records associated with multiple charges or lesser offences, included 517 cases in which an offender had been sentenced on a single charge of aggravated assault.⁴⁹²

Analysis of the sentencing patterns for aggravated assault suggests that the early Bill C-9 restrictions rendered this offence essentially ineligible for conditional sentences. Between 2006 and 2008, almost one-third of aggravated assault convictions resulted in a conditional sentence. This started dropping in 2009, with any offences that survived Bill C-9 being captured by Bill C-10 (2012). Indeed, there were no conditional sentences imposed for this offence beyond 2014. Suspended sentences on aggravated assault charges were rare, possibly due to the involvement of victims and the likelihood that such a sentence would attract negative community or media attention. While there was a period between 2010 and 2015 in which suspended sentences were used, by 2017 almost all (over 97%) of these convictions resulted in prison terms (see Figure 4-7 below).

(ii) conduct endangering or likely to endanger the life or safety of another person or inflicting or likely to inflict severe psychological damage on another person, and for which the offender may be sentenced to imprisonment for ten years or more, or
(b) an offence or attempt to commit an offence mentioned in section 271 (sexual assault), 272 (sexual assault with a weapon, threats to a third party or causing bodily harm) or 273 (aggravated sexual assault).

⁴⁹² The original data file included 1,596 “sentenced charges” recorded against aggravated assault offences.

Figure 4-7 Aggravated assault by primary sentence (n=517)



Note: Discharges are not available for this offence; fines were calculated but not shown (2/517).

In order to assess the impact of shifting conditional sentences to jail terms, sentence lengths for each sanction were calculated.⁴⁹³ As illustrated in Table 4-12 (below), 2006 to 2008 appear to be the last three years in which conditional sentences were used with any regularity for this offence; at that time the orders tended to be long (mean and median over one year) and the most common term was for the maximum available under s. 742.1—two years less a day (729 days). Mean and median jail terms appear to have increased somewhat as they absorbed cases between 2010 and 2014, decreasing thereafter until reaching a low of 410 and 400 days, respectively, in 2017. The decrease noted in the length of jail terms could be linked to the addition of the less serious cases that would otherwise have resulted in conditional sentences. It is also consistent with research suggesting that judges may see short jail terms with lengthy

⁴⁹³ To calculate sentence lengths for jail terms, all sentences of “one-day jail” were removed (40 records were removed; one-day jail represented 9.5% of all jail sentences for this offence).

probation as effective substitutes for longer conditional sentences.⁴⁹⁴ On this point, Benedet (2019) refers to comments made by a judge who was sentencing an offender on a charge for which a conditional sentence was no longer available:

Had a longer period of house arrest been available as a sentencing alternative, I would have considered it. This would have allowed her to avail of treatments and programs that may address the underlying causes of her crime. Similar goals can be achieved through a short period of incarceration followed by supervised probation.⁴⁹⁵

Notably, for the last two years examined (2016 and 2017), terms of imprisonment on aggravated assault offences had a mode of 90 days. While the data did not include flags identifying intermittent jail terms, it is likely that some of the 90-day terms represented jail sentences served in this fashion.⁴⁹⁶ While the numbers were small, there were no 90-day jail terms imposed prior to the Bill C-9 restrictions. This suggests that some judges may have imposed intermittent sentences to mitigate the harshness of regular jail terms, searching for a middle ground that no longer existed within the aggravated assault sentencing range.

Table 4-12 Sentence length - jail vs CSO - aggravated assault (# days)

JAIL > 1 DAY					CSO			
	#	Mean	Median	Mode	#	Mean	Median	Mode
2006	36	759	730	730	15	586	540	729
2007	30	575	562	562	19	454	450	729
2008	18	664	729	729	11	476	540	729
2009	23	500	498	150	7	499	540	540
2010	34	606	480	360	6	393	315	729
2011	31	598	450	180	4	490	480	270
2012	38	725	540	730	1	180	180	180
2013	41	708	679	730	1	360	360	360
2014	36	656	640	730	2	360	360	360
2015	30	641	393	270	0	0	0	0
2016	32	544	380	90	0	0	0	0
2017	32	410	400	90	0	0	0	0
Total	381				66			

⁴⁹⁴ Benedet, *supra* note 310 at p. 311.

⁴⁹⁵ *R. v. Merkuratsuk*, 2012 NLTD(G) 11 at para 28; cited by Benedet, *Ibid* at p. 311.

⁴⁹⁶ Ninety days is the maximum term of imprisonment that can be served intermittently (s.732).

In recent years, sentences on aggravated assault offences were also more likely to include probation. From 2006 to 2007, for instance, 44.1% of conditional sentences and just over half (51.4%) of jail terms included probation to follow; from 2008 to 2013, this increased to 53.3% and 62.1% respectively. Prison terms imposed in the post Bill C-10 period (2014 to 2017) suggest a further increase, with up to 68.3% including probation to follow.

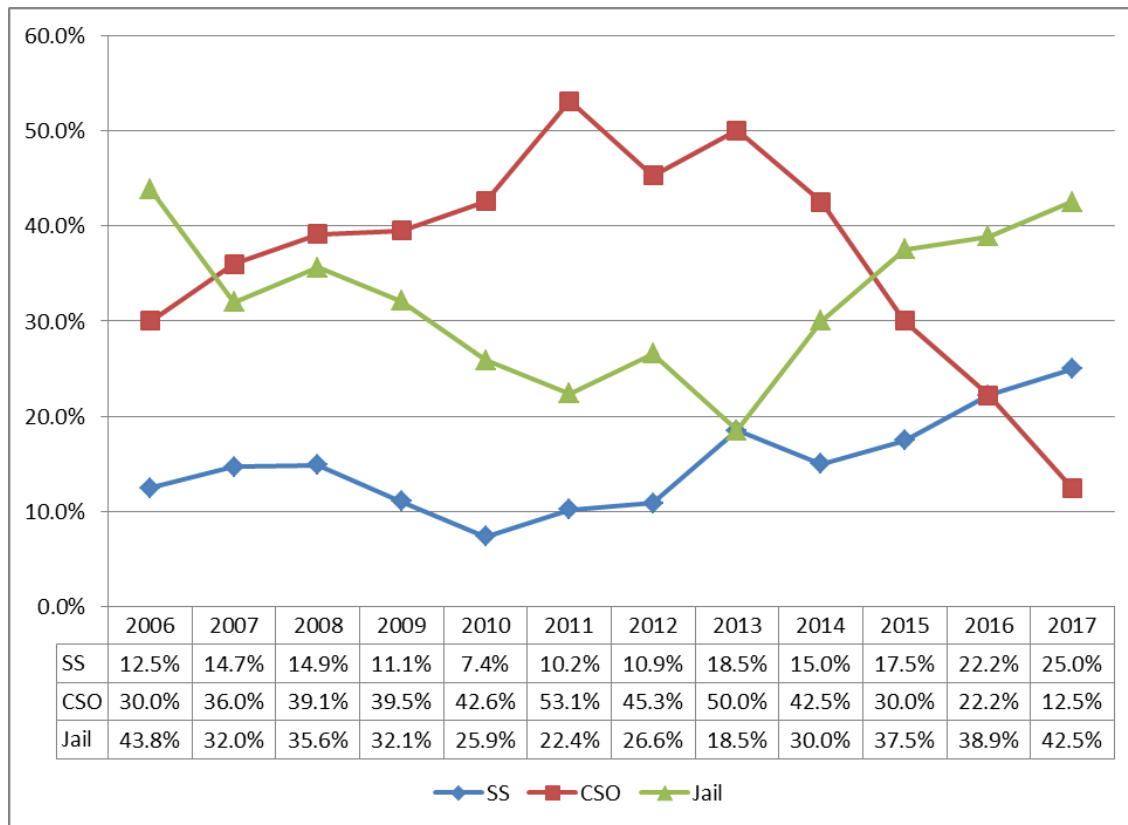
Theft over \$5,000 (s. 334(a))

Theft over \$5,000 is a strictly indictable offence that became ineligible for conditional sentencing as a result of Bill C-10 amendments. Dataset 1, which excluded all records associated with multiple charges or lesser offences, included 700 cases in which an offender was sentenced on a single charge of theft over \$5,000.⁴⁹⁷ Notably, conditional sentences were the most common sentence imposed for this offence from 2007 until 2014, and then the least common (relative to jail or suspended sentences) by 2017 (see Figure 4-8 below). The proportion of charges for theft over \$5,000 resulting in jail sentences increased post Bill C-10, from 18.5% in 2013 to 42.5% in 2017. During that same time, conditional sentences were reduced from 50% in 2013 to 12.5% in 2017.⁴⁹⁸ Suspended sentences, which fluctuated between 7.4% and almost 15% until 2012, started increasing in 2013 (18.5%), reaching a high of 25% in 2017.

⁴⁹⁷ The original data file included 2,062 sentenced charges recorded against theft over \$5,000 offences.

⁴⁹⁸ At one point, the expectation was that conditional sentences for this offence would continue dropping until eliminated completely (subject to offence date attrition). Notably, this changed with the enactment of Bill C-75 (2019), legislation that had the effect of hybridizing the offence of theft over \$5,000, giving prosecutors the option of proceeding summarily, in which case a conditional sentence would remain available.

Figure 4-8 Theft over \$5,000 by primary sentence (n=700)



Note: Fines & discharges calculated but not shown.

If all pre Bill C-10 conditional sentences represented instances in which the offender would have otherwise been sentenced to jail, then we would have expected the vast majority of them to be replaced with jail terms post Bill C-10. Instead, what we see between 2012 (pre) and 2017 (post) is a 32.8% reduction in conditional sentences, and only a 15.9% increase in the use of jail. The 14.1% increase to suspended sentences during this time suggests that some cases that otherwise would have been conditional sentences pre Bill C-10, have likely been replaced by suspended sentences post Bill C-10.⁴⁹⁹

⁴⁹⁹ The trend towards the reduced use of conditional sentences accompanied by the increased use of both jail and suspended sentences is evident even when the starting year is delayed in order that a greater proportion of cases to which the conditional sentencing restrictions would apply can be captured (i.e., offence dates past November 2012). Between 2014 and 2017, for instance, conditional sentences went from representing 42.5% of outcomes, to 12.5%, while terms of imprisonment increased from 30% to 42.5%, and suspended sentences increased from representing 15% of outcomes to 25%.

Sentence lengths for conditional sentences and jail terms were also calculated.⁵⁰⁰ While there was considerable variance due to the low number of cases, conditional sentences for this offence tended to be considerably longer than jail terms imposed. Up until 2013, for instance, the median conditional sentence term was consistently 1.5 to 2 times as long as the median jail term. While caution is required, the data suggest that (pre Bill C-10) conditional sentences may have been replaced with considerably shorter (post Bill C-10) terms of imprisonment.⁵⁰¹ The median prison term between 2014 and 2016, for instance, was well within the 90-day limit for intermittent jail terms (the range was 65 to 75 days).⁵⁰²

Finally, the (shorter) prison terms that likely replaced conditional sentences post Bill C-10 were more likely to have probation orders attached. Notably, there was an increase, overall, in the percentage of sentences that were followed by probation orders. In the 2006 to 2007 period, for instance, approximately 39% of both conditional sentences and jail terms included probation to follow; between 2008 and 2013, this increased to 50.3% for conditional sentences (jail terms were essentially unchanged at 40.4%). In the post Bill C-10 period (between 2014 and 2017), almost three-quarters (70.7%) of the prison terms imposed on theft over \$5,000 offences included probation to follow. This trend is consistent with earlier (e.g., aggravated assault) outcomes, and may represent an increase in the use of intermittent prison terms (which include mandatory probation orders), or instances in which judges are using probation attached to short prison terms in place of conditional sentences.⁵⁰³

⁵⁰⁰ To calculate sentence lengths for jail terms, all sentences of one-day jail were removed (60 records were removed; one-day jail represented 26.5% of all jail sentences for this offence).

⁵⁰¹ This could reflect the fact that conditional sentences are expected to be longer than the terms of imprisonment that they replace, or the possibility that less serious offences (that had previously resulted in conditional sentences) are being captured.

⁵⁰² In 2013, the median prison term was 180 days (mode 52 days); in the initial post Bill C-10 period (2014 to 2016), the median prison terms were 65, 72, and 75, respectively. In 2017, the median prison term doubled to 150 days (mode 90 days). This discontinuous result may be a reflection of the low number of cases that fit the established criteria (from 2013 to 2016 there were merely 33 single charge cases that resulted in prison terms of more than one day; in 2017 there were 14).

⁵⁰³ A shift to short prison terms followed by probation is consistent with a recent decision of the BC Court of Appeal. In *Jacobs*, the Court accepted a joint submission that an illegal 12 month conditional sentence (imposed on an offence no longer eligible) be replaced with a sentence of one-day jail followed by 22 months of probation. See *R. v. Jacobs*, 2020 BCCA 287.

Drug trafficking

Drug trafficking offences provided a relatively large pool of cases that regularly attracted conditional sentences prior to Bill C-10 and were generally ineligible after Bill C-10. Dataset 1 included 6,987 cases involving sentences on single charges of drug trafficking.⁵⁰⁴ Case volume was not evenly distributed across the years, going from a high of 914 cases in 2008 to a low of 279 cases in 2016.⁵⁰⁵

In terms of sentencing patterns, the proportion of drug trafficking charges that received prison sentences increased substantially post Bill C-10; from less than one-third (31.1%) in 2012 to more than half (54.3%) in 2017 (see Figure 4-9 below). At the same time, conditional sentences dropped from 56.7% of drug trafficking sentences in 2012 to only 7.3% in 2017. The direction of these changes was expected; the quantum was not. Put another way, if all pre Bill C-10 conditional sentences represented true diversions from prison, then we would expect all of them to transform into prison terms post Bill C-10. In fact, what we see is a 49.4% drop in conditional sentences, but only a 23.2% increase in jail; the balance (26.2%) is almost completely explained by the unexpected increase in suspended sentences, which went from representing only 4.9% of drug trafficking sentences in 2012 to almost one-third (30.1%) in 2017.

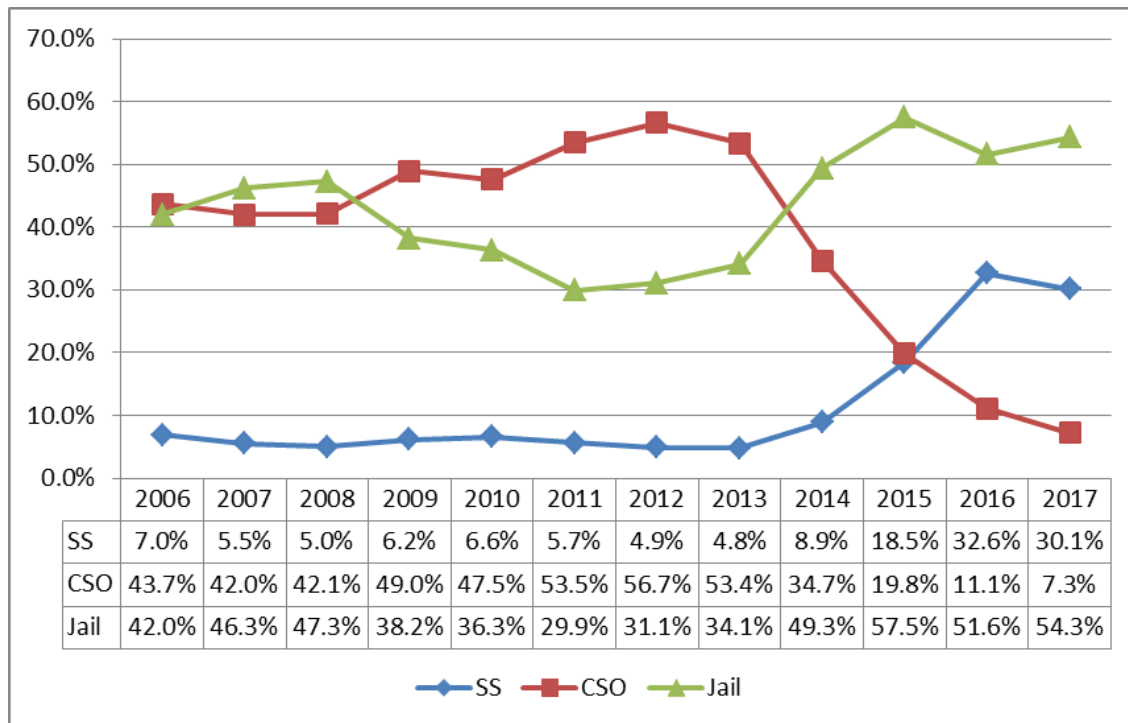
Given that the trend towards the increased use of probation appears to be broad (it is apparent beyond the specific offences impacted by Bill C-10; see Figure 4-4), it is likely that other factors are also at play. It may be, for instance, that the shift towards the increased use of probation is also associated with a more managerial approach within the justice system, one that focuses on risk aversion and expanding community-based responses that enable offender surveillance, supervision, and control, rather than rehabilitation. See Feeley, M. M., & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology*, 30(4), 449–474.

For a discussion of the impact of risk aversion in the context of bail, see Deshman, A., & Myers, N. (2014). *Set up to fail: Bail and the revolving door of pre-trial detention*. Canadian Civil Liberties Association and Education Trust, at p. 83; Webster, C. M. (2014). “Broken Bail” in Canada: How we might go about fixing it. Research and Statistics Division; Department of Justice Canada; and Sylvestre, et al., *supra* note 347.

⁵⁰⁴ The original data file included 19,472 sentenced charges recorded against drug trafficking offences.

⁵⁰⁵ The decrease in drug offences was likely related, at least in part, to changes in the marihuana laws.

Figure 4-9 Drug trafficking by primary sentence (n=6,987)



Note: fines & discharges were calculated but are not shown

Sentence lengths for jail⁵⁰⁶ and conditional sentences pre and post Bill C-10 for this offence appear to have changed in 2014 (see Table 4-13 below).⁵⁰⁷ From 2007 to 2013, the median conditional sentence for drug trafficking was 270 days (9 months); the mode was 180 days (6 months) for all but one of those years. During the same period, the median term of imprisonment increased gradually, peaking at 208 days (7 months) in 2013; the mode was 180 days (6 months) for all but one of those years. Notwithstanding the noted use of suspended sentences (from 2014 to 2017), many of the conditional sentences were replaced by jail terms. Again, given that *Proulx* encourages judges to extend the length of conditional sentences past the terms of imprisonment they replace, it is unsurprising that longer orders appear to have been replaced by shorter jail terms. What is notable, however, is that between 2014 and 2017 (post Bill C-10), the most

⁵⁰⁶ To calculate sentence lengths for jail terms, all sentences of one-day jail were removed (575 records were removed; one-day jail represented 19.7% of all jail sentences).

⁵⁰⁷ While the Bill C-10 changes were effective as of November 2012, delays in case processing likely pushed the conclusion of offences committed past this date into 2013 and 2014. This would be especially true for drug trafficking given that, unlike charges of aggravated assault and theft over \$5,000, there are no identifiable victims, and the offender is less likely to be held in custody pending case resolution (two factors that expedite case scheduling).

imposed jail term (mode) shifted from 180 days (6 months) to 90 days (3 months). As observed with aggravated assault and theft over \$5,000 sentences, this may signal an increase in the use of intermittent jail terms by judges who are looking to “soften the harshness of other rules.”⁵⁰⁸

Table 4-13 Sentence length - jail vs CSO - drug trafficking (# days)

Drug trafficking – sentence length jail >1 day & CSO								
JAIL > 1 DAY					CSO			
	#	Mean	Median	Mode	#	Mean	Median	Mode
2006	239	211	90	90	346	259	240	180
2007	293	167	120	180	365	289	270	180
2008	311	181	120	180	385	280	270	180
2009	264	232	150	90	428	283	270	180
2010	199	214	128	180	318	298	270	180
2011	146	365	173	180	302	286	270	270
2012	155	234	150	180	315	305	270	180
2013	152	335	208	180	269	304	270	180
2014	165	226	180	90	128	308	330	360
2015	166	254	180	90	61	318	270	360
2016	116	253	150	90	31	380	270	180
2017	136	297	180	90	20	201	150	90
Total	2,342				2,968			

The findings on drug trafficking sentences (with or without probation) are interesting for two reasons. First, the number of cases is large enough that results can be interpreted with more confidence. Second, probation rates in this group have tended to be relatively low. While we may intuitively link drug trafficking offences with drug addicted offenders (that presumably require rehabilitation), as noted by the court in *Franklin*, many dealers are simply attracted by easy money and “the high profits available with little effort.”⁵⁰⁹ For these offenders, probation tends to focus more on area restrictions than on traditional rehabilitative requirements (e.g., attending treatment).⁵¹⁰

Notably, there was a slight change in the use of prison with probation for drug trafficking offences (see Table 4-14 below). Indeed, while the use of conditional

⁵⁰⁸ Paciocco, *supra* note 486 at p. 176.

⁵⁰⁹ *R. v. Franklin*, 2001 BCSC 706 at para 45.

⁵¹⁰ See generally, Sylvestre, et al., *supra* note 503 at pp. 40-41.

sentences with probation was stable (15-17%), the prison plus probation combination was not. Prior to Bill C-10, approximately 28% of the prison terms imposed (overall) included probation to follow; post Bill C-10 (2013 to 2017), this increased to 38%.⁵¹¹

Table 4-14 Drug trafficking – CSO and prison - probation attached

	CSO (Total)	CSO with probation		Prison (Total)	Prison with probation	
	Number	Number	Percentage	Number	Number	Percentage
2006-2012	2,458	380	15.5%	2,085	588	28.2%
2013-2017	510	85	16.7%	832	316	38.0%
Total	2,968	465		2,917	904	

The increase was more dramatic when short prison terms were isolated. Indeed, when the 1,486 cases that resulted in jail terms of under 91 days were analyzed separately, a clear discontinuity emerged. Of those imposed prior to Bill C-10 (2006 to 2012), 33.4% included probation; post Bill C-10 (2013 to 2017) this increased to 62.6%.⁵¹² In terms of possible explanations, these results are consistent with conditional sentences being replaced by either intermittent jail terms (with mandatory probation orders) or short (less than 91 days) jail terms with probation attached. Both results can be seen as a form of judicial circumvention, given that the BC Court of Appeal has confirmed a sentencing range of six to twelve months imprisonment for drug trafficking in the normal course, or a suspended sentence in cases in which “exceptional circumstances” are accepted; no middle ground is provided.⁵¹³

⁵¹¹ While one-day jail terms were excluded for the purpose of calculating sentence lengths, the rationale for doing so (skewing) does not apply to the ‘prison plus probation’ issue explored here. Accordingly, as was the case with the aggravated assault and theft over \$5,000 cases, one-day jail terms were not excluded for these calculations.

⁵¹² A separate analysis was conducted only on the one-day jail sentences, which were found to behave similarly. Prior to Bill C-10 (2006 to 2012) 35.8% of such outcomes included probation; post Bill C-10 (2013 to 2017) this increased to 60.8%.

⁵¹³ The term “exceptional circumstances” refers to a doctrine that allows judges to depart from (in this case, meaning “to go below”) the normal sentence range in a specific case, while still preserving the sentencing norm for other offenders.

Summary

The review of sentencing patterns for specific offences (e.g., aggravated assault, theft over \$5,000, and drug trafficking), both pre- and post-sentencing restrictions,⁵¹⁴ suggests that conditional sentences were not always replaced with an equivalent (albeit adjusted) term of imprisonment, as would be expected.⁵¹⁵ Rather, in many instances they also appear to have been replaced either by suspended sentences or short prison terms with probation. Indeed, the increased use of suspended sentences for drug trafficking offences, and the tendency to make such orders more onerous through the imposition of curfew or house arrest requirements (see section 4.1.1.3), suggest that judges may be circumventing the restrictions placed on conditional sentences by, essentially, reconstructing them as longer and stronger suspended sentences.⁵¹⁶ While this would clearly be inconsistent with parliamentary intent, there appears to be indications—as expressed by the judges who participated in this study—that judges may, in fact, be “shaving the peg.” Notably, this circumvention was rooted in a number of different rationales.

4.2.3.2 Judicial response to Bill C-10: The rationales

Much of the criticism of Bill C-10 focused on the increased number of offences for which mandatory terms of imprisonment applied and the restrictions introduced on the

⁵¹⁴ Given that these findings relate only to single-charge cases, there was an interest in exploring whether similar results would be obtained had multi-charge cases also been included. After all, common sense would suggest that offenders being sentenced for multiple offences would likely be facing more severe outcomes. To that end, overall sentencing trends for each of the three specific offences were also reviewed. To be clear, this included sentences attached to all counts, regardless of whether part of a single or multi-charge case. Importantly, the trends (i.e., whether the use of a sanction was increasing or decreasing) remained, though the proportion for which suspended sentences were used decreased (as one might expect).

For example, when primary sentences for each of the 19,472 counts of drug trafficking were plotted, the results suggested considerable stability between 2009 and 2013 (averaged at 50.1% prison, 40.6% conditional sentences, and 4.5% suspended sentences). Notably, after 2013 the use of conditional sentences starts decreasing, reaching a low of 4% by 2017. Over the same time, the use of prison steadily increases (to 74.1% in 2017), as do suspended sentences (to 18.6% in 2017).

⁵¹⁵ The term “equivalent term of imprisonment” recognizes that judges had been directed (in *Proulx*) to make conditional sentences longer than the prison terms they replaced. And so, for instance, we might expect that a conditional sentence of nine months would be replaced by a prison term of six or seven months (but not three months or less).

⁵¹⁶ In *Bankay*, the ONCA referred to such orders as “disguised conditional sentence[s],” holding that it was an error in law to “impose a sentence that circumvented Parliament’s decision to exclude conditional sentences for this offence” (*supra* note 380 at para 2).

use of conditional sentencing. While the rationale for Bill C-10 was not specifically raised as part of the interviews or survey, 14 judges (12 interviews; two surveys) expressed views on the issue. The most referenced rationale was captured as the politicization of sentencing policy (eight interview subjects and two survey respondents).

The politicization of sentencing policy

Those who saw Bill C-10 restrictions as politically driven expressed frustration that judicial discretion had been limited, not because of evidence-based policy considerations, but because of “political pandering.” Judge T, when asked to clarify whether the “pandering” was to the public, responded by asking, rhetorically, “the response to the public outcry that was generated by the government to get the outcry?” Judge W also framed Bill C-10 amendments as being both political and ill-informed, saying that:

What Harper was doing was being a political animal, not an animal that, as far as I’m concerned, dealt with the realities of the legal world or the sentencing process. I don’t blame him for that, that’s what his job was. But it has some effect when it filters down to the Provincial Court; there are repercussions and accountability. It says to me, that which I’ve done and my experience of [20 plus] years doesn’t mean anything. You, who are sitting in Ottawa in a political seat know much better because you have constituents, the lowest common denominator, to answer to.

Judge P also challenged the rationale behind the restrictions placed on conditional sentencing, suggesting that the primary motivation was political, not evidence-based:

I mean, was there an actual problem that the government was addressing in bringing in those bills and restricting CSOs? I don’t think there was. I think it was politically motivated—totally politically motivated. It’s what that government thought its support base wanted to hear, without regard to whether it was addressing a problem with the sentences.

Finally, one of the survey respondents (Judge #4) connected the government’s motivation in restricting judicial discretion to the type of populism represented in the United States by the policies of Donald Trump:

I view the legislation as largely a matter of political pandering more consistent with “Trumpism” than with core Canadian values. It has empowered lazy and/or unethical prosecutors to over-charge. It generally

screws the poor or disadvantaged defendant without altering the outcome that much for well-off or gang-connected defendants.

Of the judges who spoke on this issue, two made a point of contrasting Bill C-10 with the 1996 reforms (Bill C-41). Judge D described the government that enacted Bill C-41 and introduced conditional sentences as having “courage;” Judge T focused on Bill C-41 as legislation that was based on sound theory, as opposed to hysterics, saying:

[The restrictions] were based on absolutely no study—no data. They were based on hysterics, so it doesn’t surprise me that on the one hand, you’ve got a sentencing regime coming in in 1996 which was based on sound theory....whereas [the restrictions were] all about bringing in things that are politically attractive to a certain group of the demographic but have no sound basis in theory. It also kind of plays nicely into this idea of pansy-assed judges that are giving these ‘get out of jail free cards’, ignoring the fact that jail doesn’t actually rehabilitate anyone.

Judge T was clearly frustrated, as was another judge who spoke of the need for “bravery,” suggesting that “it [would require] some political bravery for them to [lift the restrictions]. It was far easier to do it the other way around than it will be now” (Judge C). Clearly, for at least some judges, the politicization of sentence policy acted to delegitimize the reforms introduced in 2012. This in turn served as a form of justification for non-compliance with restrictions seen as being unduly harsh (i.e., circumvention). For Judge D, for instance, perceived flaws in the legislative process created a “permission structure” that allowed for creativity:

[Suspended and conditional sentences] are really different, and I tried to keep conditional sentence orders as prison sentences, but in some cases the imposition of a conditional sentence order is prohibited by statute. Now, a judge can accept the experience and wisdom of Parliament or ask whether or not the legislature even considered the situation being addressed. If you come to a negative response on that latter question, then you find a conflict between problem-solving and the legislative scheme, and that’s when you get creative.

Notably though, not all judges focused their criticisms at the Harper government. Indeed, seven of the judges interviewed gave responses that were broadly categorized as “Bill C-10 was a response to how CSOs were being used.” Two of these judges suggested that conditional sentences were being used too often, especially post *Proulx*, or that the orders were too similar to probation (Judge O and Judge G). Two other judges saw the restrictions as an over-reaction by government to a small number of

cases in which people on conditional sentences subsequently offended in a serious way (Judge A and Judge B).

Three participants believed that judges themselves were at least partially responsible for the restrictions placed on their discretion. Judge N attributed the government response to concerns around disparity, suggesting that “if there had been a little bit more uniformity around some of the sentences, maybe we wouldn’t have gotten to [CSO restrictions and mandatory minimums].” Judge T’s response goes further, drawing a direct connection between the curtailment of discretion and the inappropriate application of conditional sentences:

I think that’s why the past government went to restricting [CSOs]—because I think that they looked at it and decided they didn’t think there should be CSOs for a certain category of offences. Our anecdotal experience is that the judiciary wasn’t focused on what is the appropriate sentence; they were focusing on ‘should the person be in or out of jail’.

Finally, much like Judge T, Judge U tied the restrictions imposed to the use of conditional sentences for serious offences that provoked public pushback. Notably, this judge makes a direct connection between the use of conditional sentences in certain serious cases and a loss of confidence in the judiciary:

I think a lot of it is the fault of the judiciary—for abusing their function and role. I think that’s what got us into this mess—that’s why Parliament has taken [CSOs] away. It would have to be so exceptional for me to say that somebody who had sexually abused a child should be out on the street, and [CSOs] were so frequently imposed for child sex cases... There don’t have to be a lot, but you get enough of those cases that the public [reacts to] and Parliament just loses confidence in judges generally being able to properly apply the law. So, they just take it away.

Independent of the catalyst for legislative change, the injection of politics into the development of sentencing policy seemingly provided some judges with justification to circumvent the clear intent of the reforms. As will be discussed in the following sections, this issue arose most often when judges spoke of dealing with marginalized offenders or with offences that may have been previously up-tariffed to prison terms (so that conditional sentences could be imposed). In terms of the former, one Ontario judge spoke eloquently of the challenges faced by sentencing judges who operate on the frontlines of the court system:

I see these people in their worst moments, sometimes shackled, but always bowed and humiliated and hurting. Often sick, always in need. It is impossible not to be affected by this. One would have to be blind not to see the diversity of our communities, and heartless not to crave solutions to inequality and excessive use of the criminal law.⁵¹⁷

The sympathetic offender – “the bad and the sad”

In terms of the marginalized or disadvantaged offender, several judges distinguished between the criminal act and the person as a criminal. Judge A, for instance, captured this sentiment when explaining that “I think most people are properly characterized as human beings who have committed a bad act or series of bad acts.” Notably, for some, this was manifested in beliefs that judges must have tools that allow them to deal differently with offenders who are “sad” as opposed to those who are “bad.” As Judge B explained,

There are basically two categories of criminal offenders: the bad and the sad. The bad are people who are pathologically disturbed or, as a result of their upbringing, are so violent or so engaged in a criminal lifestyle that they’re probably never going to step away from it until they get too old to commit crime. The sad are the people who never really had a good start in life, whether it be as a result of FASD, as a result of a dysfunctional family upbringing, as a result of having parents who for a variety of reasons were already mentally ill or drug addicted, or alcohol addicted themselves.

Judges reported considerable frustration when trying to address what they saw as root causes. Indeed, as one judge noted, “it’s hard as a judge, on the back end; we aren’t social workers. If someone is homeless, there’s not much I can do about that. That’s the difficult part” (Judge A). Judge L spoke of “going through the motions,” but being limited in terms of his or her ability to engage in meaningful problem-solving:

We are the residual legacy of all of society’s problems...So, in taking that responsibility we should be able to, with professional assistance, identify the problems and in most cases, we should be looking at ways to address those.

Concepts of reintegration and the notion of community were a theme for several judges. While not directly tied to conditional sentencing, Judge A spoke of the challenge

⁵¹⁷ The Honourable Justice David M. Paciocco. *Questionnaire for Judicial Appointment* (Ontario Court of Appeal). Accessed Nov. 7, 2019: https://www.canada.ca/en/departement-justice/news/2017/04/the_honourable_justicedavidmpacioccosquestionnaire.html.

of dealing with marginalized populations, and the need to maintain community-based solutions:

Sometimes I'll tell them a story, just to make them understand. 'Sometimes I walk to work or ride my bike to work, and if I see you on the street and you've tripped and fallen down on the sidewalk, I'd pick you up. And if I did the same thing, you'd be walking the same streets that I am, and you might lend a hand and pick me up.' We're all part of the same community. It's not like '[I am] a judge and you're just a lowly person who lives in [social housing]. You're part of the same physical environment, where we all help each other out. You think that you're not part of it; well, you are part of it, so am I.' I'm not above this community; I live in it.

Clearly, for this judge, the restrictions introduced by Bill C-10 frustrated efforts to keep offenders in the community. Notably, it was not the conditional sentence order, per se, that was valued; it was access to a non-custodial option—one consistent with the principle of restraint and, perhaps, the value of compassion. For some judges, this resulted in efforts to achieve the same, or similar, outcomes by other means. In other words, they got creative.

Getting creative – finding ways around the restrictions

Conditional sentences did not have to be perfect to be valued. Many judges used the metaphor of tools in a toolbox when expressing their frustration at having their discretion to use them restricted. "It's another tool in the toolbox—it's a gradation. It gives us another option and gives people an opportunity that they can take if they want" (Judge X). Even those who rarely imposed conditional sentences took issue with the Bill C-10 amendments: "I'm frustrated with Parliament for taking them away. I would say that I never imposed a lot of CSOs as a judge, and still don't...But they have such a valuable function for the right circumstance" (Judge U). The sense that there were unique offence/offender combinations that lent themselves particularly well to conditional sentencing was repeated often, though there was little consensus on what those combinations should be. As Judge "I" explained, "the more tools you have, the more it can be an individualized process. Even a conceptually odd tool can still serve a purpose in terms of message and an individualized sentence."

Notably, several judges raised the issue of suspending sentence as a creative or pragmatic way of addressing situations in which a conditional sentence would be the best fit but was no longer available (14 interview participants; four survey respondents).

Aside from one judge who did not believe it happens, the remaining 17 responses involved judges either being aware that other judges do this or commenting that they do this themselves. The following section reviews their responses in terms of the rationale provided and concerns raised.

“We’re now back to contorting ourselves”

Judges appeared to be aware that it is problematic to explicitly acknowledge the practice of suspending sentence as a way of getting around the conditional sentence restrictions. As Judge A explained:

I know a few judges have gotten into trouble by not saying the right words, sort of giving a suspended sentence when they really wanted to give a conditional sentence order, but it wasn’t available...You’re not supposed to do it; you have to do it the right way.

Regardless, several judges were quite open about their own practices in this regard. As Judge P acknowledged, “yes, I’m using [suspended sentences] in some circumstances where it should be a CSO.” Similarly, Judge K reported that “I think I use [suspended sentences] a little bit more on the offences where we can’t use conditional sentences.” In terms of survey responses, Judge #1 justified this practice by pointing to the negative impacts of imprisonment:

Restricted use of conditional sentences means that I have ended up using suspended sentences rather than jail. Doing so has increased the possible jeopardy of public safety. I have done so as the alternative of jail is worse.

Indeed, for several judges the rationale for suspending sentence in such cases was linked to perceptions that the restrictions resulted in sentences inconsistent with the principle of restraint. As survey judge #13 noted, “occasionally, counsel and the court have to be creative to produce a fit sentence, working around the [restrictions].” Indeed, Judge X also spoke of the need for flexibility, observing that, “we’re now back to contorting ourselves again, to keep someone who shouldn’t go to jail...out of jail.” Put another way, when a strict application of the law would lead to the incarceration of an offender *whom the judge believes “shouldn’t go to jail,”* ways can be found to circumvent the sentencing provisions set out in the *Code*.

“A slippery way of circumventing Parliament’s intention”

Other judges expressed concerns regarding the practice of using suspended sentences for offences no longer eligible for conditional sentences.⁵¹⁸ Judge U, for instance, took this perspective:

I just see it as a slippery way of circumventing Parliament’s intention. I’m a firm believer in the rule of law—that we shouldn’t be looking for ways to dodge Parliament’s intent. It’s not for us to decide what laws we’re supposed to impose. I see that whole argument as being a bit of a way of dodging the truth. I understand the motivations, but I just don’t think it’s for us to be trying to be creative—to dodge what Parliament really intended.

For some judges, there was a sense that boundaries were being tested. After all, when suspended sentences for offences no longer eligible for conditional sentencing emerged, the appellate court response could have been to correct such efforts. In BC, however, the appellate court did not condemn the practice, electing instead to give sentencing judges the language and methodology they needed to continue doing so. Consequently, while some of the judges interviewed had criticized the government for having restricted their discretion, others were also critical of the court, presumably including the BC Court of Appeal. As Judge G explained:

Nowadays if you can’t give a CSO, a lot of the court is resorting to suspended sentences with probation with the same terms that would be on a CSO, so it’s somewhat intellectually dishonest. That’s kind of the way they’ve evolved, and the courts have permitted that to occur.

4.2.3.3 Judicial response to Bill C-10: The imprimatur of the Court of Appeal

Prior to Bill C-10, there was jurisprudence in BC that endorsed the use of conditional sentences for offences that would normally attract custodial sentences, most often in cases in which exceptional circumstances existed. *Voong* (2015) is a post Bill C-10 case that involved four crown appeals of suspended sentences imposed for drug trafficking, an offence that would normally attract a custodial sentence, and was no

⁵¹⁸ Four responses expressed concern. Three were from interview participants, one from the survey.

longer eligible for a conditional sentence.⁵¹⁹ In this case, the BC Court of Appeal extended the exceptional circumstances doctrine that had previously supported a conditional sentence, now to justify the suspending of sentence. In doing so, the Court was able to reclaim (or restore) a sentencing option more consistent with restraint and individualization.⁵²⁰

Pre Bill C-10 cases - prison vs conditional sentence

When conditional sentences were still widely available, the bulk of appeals on drug trafficking cases involved defence arguments for conditional sentences in place of traditional prison terms. This included offences involving dial-a-dope style⁵²¹ drug trafficking in Schedule I offences.⁵²² In *Franklin*, Henderson J. reviewed a number of early post-*Proulx* cases which addressed the appropriateness of using conditional sentences for such offences, concluding that cases in which conditional sentences were imposed (or upheld on appeal) should be “viewed as relatively rare instances of cases [in which] unusual circumstances have led the court to [conclude] that a conditional sentence is appropriate.”⁵²³ And so, prior to Bill C-10, the issue was determining the limited and rare conditions under which a conditional sentence of imprisonment might be a fit sentence for an offender convicted of trafficking in so-called hard drugs.

⁵¹⁹ *Voong*, *supra* note 34. In *Voong*, each of the four offenders had entered guilty pleas to charges of having either trafficked in Schedule I drugs (cocaine and/or heroin) or having possessed them for the purpose of trafficking, all in the context of a dial-a-dope operation. In each case the judge suspended sentence and placed the offender on probation, a response that signalled a marked departure from the established range for this offence. On appeal, three suspended sentences were upheld (though the term of one was lengthened); in one (*Taylor*), the crown appeal was allowed, and a jail term of six months was imposed.

⁵²⁰ Paciocco suggests that a broad interpretation of ‘exceptional circumstances’ is a legitimate legal technique that can be used by judges to “soften the harshness of other rules” (*supra* note 486 at p. 176).

For an intriguing twist on the notion of ‘exceptional circumstances’, see *R. v. Summers*, 2014 SCC 26, in which the similar expression of ‘if the circumstances justify it’ in 719(3.1) was understood by the Supreme Court in its broadest terms to be able to include virtually all offenders.

⁵²¹ Dial-a-dope operations allow customers to contact dealers by phone or text to arrange the delivery of drugs. Dial-a-dope trafficking is an aggravating feature, adding to the presumption of jail upon conviction for such charges. See, for instance, *R. v. Franklin*, 2001 BCSC 706.

⁵²² Trafficking in Schedule I substances (so-called “hard drugs” e.g., heroin, cocaine, and fentanyl) is prosecuted by indictment, reflecting the seriousness of the offence.

⁵²³ *Franklin*, *supra* note 521 at para 43.

Post Bill C-10 cases - prison vs suspended sentence

The restrictions on the use of conditional sentences were expected to effectively close the door on non-custodial sanctions for many offences. Though suspended sentences remained technically available, the willingness of the Court to apply the more lenient option was unexpected. As Healy (2013) observed:

If a conditional sentence would have otherwise been appropriate, it implies that imprisonment would be appropriate. The effect of the amendment will be to impose a term of imprisonment in provincial jail in all but rare cases.⁵²⁴

And so, in the wake of Bill C-10, the Court looked for guidance in their earlier decisions, albeit with the added challenge of applying the rationale used to justify conditional sentences of imprisonment (punitive sanctions) to arguments around the appropriateness of suspended sentences with probation (rehabilitative sanctions). Notably, in post Bill C-10 cases the appellate court began blurring the distinction between conditional sentences and suspended sentences.⁵²⁵ Indeed, in *Oates*, the Crown argued that “with increasing frequency dial-a-dope trafficking is being met with suspended sentences by trial judges now that conditional sentences are no longer available for trafficking in these substances.”⁵²⁶

In *Voong*, the Crown argued that three of the four sentencing judges had used suspended sentences as unlawful substitutes for the (now unavailable) conditional sentence.⁵²⁷ Notably, the Court made it clear that substituting a suspended sentence for a conditional sentence would be an error, but then reframed the issue as one of sentence fitness.⁵²⁸ The focus was on the applicability of exceptional circumstances in each case, rather than on whether a conditional sentence would have been imposed,

⁵²⁴ Healy, *supra* note 315 at p. 298 (footnote 43).

⁵²⁵ In *Carillo*, for instance, the BC Court of Appeal framed both suspended and conditional sentences as community-based options (*R. v. Carillo*, 2015 BCCA 192 at para 29).

⁵²⁶ *R. v. Oates*, 2015 BCCA 259 at para 2.

⁵²⁷ *Voong*, *supra* note 34 at para 4. “The Crown says that in each case except *Voong*, the judge used the suspended sentence as an unlawful substitute for a conditional sentence order.”

⁵²⁸ *Ibid* at para 62. “Thus, while it is an error to simply substitute a suspended sentence for a CSO, as they are not governed by the same principles, that does not end the inquiry into whether these non-custodial sentences are fit.”

had it been available.⁵²⁹ This approach allowed the Court to avoid the issue of sanction interchangeability, though efforts were made, nonetheless, to reconcile the decision with the guidance provided in *Proulx*.

Reconciling *Voong* and *Proulx*

In *Proulx*, the Supreme Court of Canada went to great lengths to distinguish conditional sentences from suspended sentences and to construct the former (but not the latter)⁵³⁰ as punitive sanctions which could provide denunciation and deterrence in some cases.⁵³¹ The contortions required to get from a conditional sentence to a suspended sentence were considerable. In *Voong*, the Court (re)framed the suspended sentence as a sanction able to denounce and deter and then relied upon exceptional circumstances to justify a sentence outside the normal range for this offence.⁵³² While *Proulx* considered house arrest as a liberty restricting condition necessary to define conditional sentences as punitive sanctions, in *Voong* house arrest is envisioned as an appropriate probation term for the purpose of maintaining rehabilitation.⁵³³ Indeed, this

⁵²⁹ The overall narrative promoted in *Voong* is that almost all offenders convicted of trafficking in hard drugs will face imprisonment for a substantial period of time (six to nine months), that the application of exceptional circumstances to this group will be rare, and that sympathetic offenders who benefit from this by having their sentences suspended will be subject to harsh consequences should they fail to comply with any conditions imposed (*ibid* at para 59).

⁵³⁰ On this point, Lamer, C.J. quoted approvingly from a 1997 decision of the Saskatchewan Court of Appeal:

[Probation] seeks to secure “the good conduct” of the offender and to deter him from committing the same or other offences. It does not particularly seek to reflect the seriousness of the offence or the offender’s degree of culpability. Nor does it particularly seek to fill the need for denunciation of the offence or the general deterrence of others to commit the same or other offences (*Proulx*, *supra* note 14 at para 32 – quoting Bayda C.J.S. in *Taylor*, *supra* note 365).

⁵³¹ Lamer C.J. stressed that, unlike suspended sentences which are primarily rehabilitative in nature, conditional sentences are punitive sanctions which should include liberty restricting conditions (e.g., house arrest or curfew). *Proulx*, *supra* note 14 at para 30.

⁵³² In terms of deterrence, Bennett J.A. notes that suspended sentences have been referred to as the “Sword of Damocles” and can have a deterrent effect since a breach of the probation order can result in the offender being brought back before the court for sentencing on the original offence (*Voong*, *supra* note 34 at para 39).

⁵³³ Three of the four cases considered in *Voong* resulted in suspended sentences being upheld, one (*Galang*) after the Court extended the length of the probation order (to 36 months) and added a curfew. In one case (*Taylor*), the offender did not meet the exceptional circumstances test; the suspended sentence was replaced with a prison term of six months (plus probation).

becomes the mechanism by which suspended sentences are re-constructed as sanctions able to achieve deterrence.⁵³⁴

While noting that the doctrine of exceptional circumstances had come to be associated (post Bill C-41) with arguments in favour of conditional sentences, in *Voong* the Court reminds us that before conditional sentences were introduced, exceptional circumstances were used to justify suspending sentence on serious offences.⁵³⁵ By doing so, the Court unintentionally provides support for the proposition that the regular application of conditional sentences in drug trafficking cases was likely the result of up-tariffing. Such practices were unsustainable post Bill C-10, leaving judges either to admit to the inappropriate application of conditional sentences while they were available (i.e., saying “we are going back to suspending sentence now”⁵³⁶), or to find a way around the restrictions. *Voong* endorsed the latter course, though some judges have expressed discomfort with the practice.⁵³⁷

The judicial response to *Voong*

Earlier sections of this dissertation have suggested that at least part of the judicial response to the Bill C-10 restrictions was one of resistance and a shift towards the use of suspended sentences (and possibly shorter or intermittent jail terms). In *Voong*, the BC Court of Appeal upheld the practice of suspending sentence for offences that arguably would have received conditional sentences, had they been available. In doing so, the appellate court provided lower court judges with the language they needed

⁵³⁴ “A condition need not be punitive in nature in order to achieve deterrence or denunciation” (*Voong*, *supra* note 34 at para 43).

⁵³⁵ *Ibid* at para 79.

⁵³⁶ The sense that at least some post Bill C-10 suspended sentences represent a return to pre-1996 sentencing practices is reflected in the comments of Judge X, who explained that he or she has advised young lawyers not to “fold [their] tent and accept jail,” saying:

We used to get suspended sentences for robberies. We used to get suspended sentences for serious violent offences because the toolbox was so limited. You had to go out of your way, and you pitched the three-year suspended sentence; you got your client clean and dressed up and everything stitched together. You go into court and you sell that.

⁵³⁷ For instance, one BC judge observed that:

Frankly, if the extraordinary circumstances were of the same magnitude as they were to go from jail behind bars to a conditional sentence, it would effectively be doing what the Court of Appeal has said you cannot do, which is give a suspended sentence as a way to do an end run around Parliament. See *R. v. Madden* (12 Oct 2017), New Westminster 78944-2 (BC Prov Ct) unreported at para 26.

to impose non-custodial sanctions in such cases.⁵³⁸ While some judges welcomed the decision, seeing it as the appellate court being responsive to their concerns, others were uncomfortable with the subtle dishonesty. This variability in reaction is clearly reflected in the survey and interview responses as lower court judges wrestled with the appellate court guidance. The following section explores and contextualizes this dilemma.

“It is like putting lipstick on a pig”

During the interviews, 10 judges commented on *Voong*. Most of them (6/10) spoke of the decision as being an explicit response by the Court to the restrictions introduced by Bill C-10, suggesting that none of the appeals would have happened had conditional sentences remained available (the assumption being that all would have received conditional sentences). For instance, Judge T took the position that “if the last government had not restricted the application of CSOs, we would not have cases like *Voong*. Straight out—we wouldn’t have them.” Similarly, Judge C explained that:

Voong I’ve already mentioned. The exceptional circumstances...If we still had CSOs available for those offences, what do you think would happen? That ‘exceptional circumstances’ argument only comes up for offences where conditional sentences are no longer available.⁵³⁹

Several judges (5) acknowledged that in *Voong*, the BC Court of Appeal “heard” the lower court judges and had essentially found a way around the legislative restrictions placed on conditional sentences. Reactions ranged from appreciation to frustration to discomfort. Judge B, for instance, offered the following:

Basically, my reading of the *Voong* case...was that the Court of Appeal permitted, allowed—I’m not going to say they encouraged it—but certainly they seemed to understand the necessary legal contortions you have to go through sometimes to get to the place where in the pre-C-10 era, probably 70% of those cases would have been [CSOs] right off the bat.

⁵³⁸ To the extent that this is the case, it could be argued that the BCCA heard what lower court judges were saying, and, using the language of dialogue, supported their resistance “with a raised voice.” See Roberts & Healy, *supra* note 17 at p. 335.

⁵³⁹ The notion that the suspended sentences under review in *Voong* would almost certainly have been conditional sentences prior to Bill C-10 is consistent with findings on sentence trends for drug trafficking presented in Figure 4-9 and the fact that, pre-Bill C-10, sentence appeals on this offence primarily involved defence arguments in support of a conditional sentence when a traditional term of imprisonment had been imposed (e.g., *R. v. Gill*, 2013 BCCA 320, *R. v. Amhaz*, 2013 BCCA 348, *R. v. Herrell*, 2014 BCCA 114, *R. v. Gillespie*, 2015 BCCA 290).

Judge P framed *Voong* neutrally (i.e., without attributing positive or negative value), not as a response to unjust or unduly harsh outcomes but, rather, as “a judicial reaction to judges having their discretion fettered.” Judge G went further, describing the decision as one that introduced what was unthinkable until then:

The courts were trying to find ways around the unavailability of CSOs... Generally, no one would think of a suspended sentence with probation for drug trafficking, but now it’s occurring regularly in BC, because of our Court of Appeal.

Judge S expressed disappointment that the BC Court of Appeal had effectively established a binary choice on sentencing, observing that *Voong* provided sentencing judges with only two choices—a suspended sentence or six-months jail. This judge sought a middle ground, asking “what about something in the middle—like a two-month sentence?” Finally, one of the survey responses (Judge #20) suggested a more negative take on the efforts of the appellate court to enable circumvention. Generating a provocative mental image, this judge explained that:

I am not a big fan of taking what should be a jail sentence and turning it into a suspended sentence and probation. In most circumstances it is like putting lipstick on a pig, what you end up with is just a fashionable pig.

Suspended sentences as “disguised CSOs”

As noted, one of the Crown arguments in *Voong* was that sentencing judges were using suspended sentences unlawfully, as substitutes for conditional sentences.⁵⁴⁰ The Ontario Court of Appeal dealt with a similar issue when the Court in *Bankay* agreed that the trial judge had erred by “imposing what amounted to a disguised conditional sentence.”⁵⁴¹ This recognition of ‘creative’ sentencing in which judges in some cases have used suspended sentences in place of conditional sentences is consistent with empirical findings presented in this study. Section 4.2.3 of this chapter, for instance, highlights: 1) sentencing trends that suggest an increase in the use of suspended sentences for offences for which conditional sentences are no longer available; and 2) comments made by judges acknowledging the practice. What is less clear is whether judges are intentionally imposing a less severe sanction than they would have otherwise,

⁵⁴⁰ “The Crown says that in each case, except *Voong*, the judge used the suspended sentence as an unlawful substitute for a conditional sentence order.” *Voong*, *supra* note 34 at para 4.

⁵⁴¹ *Bankay*, *supra* note 380 at para 2.

and, whether they are knowingly reconstructing the lesser sanction (suspended sentences) as disguised conditional sentences.

Five judges addressed this specific issue during their interviews. Judge P was open when discussing the practice that some judges have developed in such cases, explaining that “[judges] make their suspended sentence look like a conditional sentence, including curfew and house arrest conditions. That’s how it’s being addressed.” For another judge, the key was in addressing the enforcement issues that have plagued suspended sentences, by encouraging prosecutors to return non-compliant offenders to court. As Judge E acknowledged, “I guess that might be a creative way of almost making a suspended sentence into a CSO type sanction. ‘If you come back, I’ll re-sentence you and I’ll be considering jail.’ I suppose you can say that.” Perhaps one of the most thoughtful responses came from Judge B, who struggled somewhat with the notion of longer and stronger suspended sentences, noting that:

[W]e say ‘okay, you get to have a probation order, but it’s going to be a really long one, it’s going to be really strict.’ You put extra things on it.... If you’re going to end up with a probation order for somebody that is so restrictive that it basically is a conditional sentence order, are you being true to the philosophy behind probation orders? But everyone seems to want it that way...[T]he whole idea of structuring a probation order so that it is almost as strict as a conditional sentence order and making it longer is perhaps an unintended déjà vu from the way the Supreme Court of Canada originally addressed things in *Proulx*.

Further support for the notion that judges are reconstructing suspended sentences in certain cases was evident in the pre/post analysis of suspended and conditional sentences imposed for drug trafficking offences. Dataset 3 provided detailed information on these sentences, including sentence length and optional conditions imposed for two calendar years. As set out in section 4.1.1.3, analysis suggests that post Bill C-10 suspended sentences looked more like conditional sentences in that they were longer and contained more onerous conditions, including curfews, house arrest, and community work service.

4.3 Summary of key findings

The findings suggest several possible explanations for the failure of conditional sentences to achieve meaningful reductions in the use of imprisonment in BC. The first

is that, notwithstanding a sentencing culture that embraced restraint, the sanction fell short in the sense that it never accounted for a large proportion of sentenced outcomes. Traditional imprisonment has consistently remained the most imposed sentence and its status, in that regard, has not been threatened in any meaningful way by the introduction of conditional sentences.

Second, there is reason to believe that, even when conditional sentences were used, there were at least some cases in which they were applied to offenders who would not have been facing custodial sentences otherwise. Given that approximately one-third (36.4%) of the orders, overall, were alleged to have been breached, the potential of such net-widening to increase imprisonment rates is clear. To complicate matters further, the direction (in *Proulx*) to make conditional sentences longer and stronger, and to terminate orders upon proven breach, may also have acted to increase, rather than decrease, the use of imprisonment within this offender group.

Notably, both the relatively low utilization of conditional sentences, and their use with offenders who would not otherwise have been subject to imprisonment, can be tied to the lack of resources provided for the monitoring of offenders in the community. In addition, there is reason to believe that any net-widening that has occurred may be linked to identified “push” and “pull” factors. Push factors were those that reduced the likelihood that judges would use conditional sentences in place of so-called “real jail.” In addition to the resource issue already mentioned, these included the sanction’s unfortunate construction as an alternate form of imprisonment, and the (related) lack of public support for its use, especially in serious cases.

Pull factors were those that were thought to increase the likelihood that conditional sentences would be used in place of other non-custodial options, primarily the suspended sentence. These included, first, a belief that the enforcement mechanisms associated with the existing non-custodial option were inadequate in terms of encouraging offender compliance. In the context of failures to comply with suspended sentences, for instance, few judges recalled ever having seen an offender returned to court for the purpose of sentencing on the original charge (as envisioned by s. 732.2(5)(d) of the *Criminal Code*). The second factor identified was associated with judges who believed both that offenders could be “fixed” and that part of their role in

sentencing was to reduce re-offending by imposing sentences that could achieve rehabilitative objectives.

There was also an interest in exploring the finding that Bill C-10 restrictions did not appear to result in an (anticipated) increase in overall imprisonment rates. While part of the answer may be related to the fact that the Bill C-10 changes had a large impact on a small number of cases,⁵⁴² jurisprudence from the BC Court of Appeal (e.g., *Voong*) suggests that more was at play. Both the analysis of sentencing trends for specific offences and the detailed review of optional conditions imposed, are consistent with the view that some judges have been using suspended sentences as reconstructed (or disguised) conditional sentences. Indeed, this conclusion was explicitly supported by several judges. These findings, along with the noted increase in the use of short prison sentences with probation, suggest that judges have, to a certain extent, found ways to circumvent restrictions that were thought to result in unduly harsh (i.e., inconsistent with restraint) sentences.

⁵⁴² On this point, see Doob & Webster, *supra* note 80(c) at p. 385.

5 Discussion – the circle that cannot be squared

We say that someone has “squared the circle” when they have brought two things together that are so different, it was thought that this could not be done. In the context of conditional sentencing, this concept could be applied to attempts at reconciling the sanction with traditional notions of imprisonment, which have taken several forms. One is language, or semantics—e.g., it is a form of imprisonment because the legislation and the courts have said it is so. Another involves attempts to shift conditional sentences towards greater punitiveness under a penal equivalence argument—e.g., it is a form of imprisonment because it incorporates liberty restricting conditions. Finally, the third group captures references to the consequences of non-compliance—e.g., it is a form of imprisonment because a new offence or non-compliance may result in actual imprisonment.

Canada’s experience with the controversial conditional sentence suggests that, when it comes to the conditional sentence *of imprisonment*, we have tried, and failed, to square the circle. For that reason, and others, the sanction has struggled as a tool for meaningful prison reduction. Perhaps this is tied to poor planning, inadequate resourcing, and the lack of guidance provided to sentencing judges; or, perhaps to the broader recognition that it is not enough to simply add another non-custodial sanction and then hope that its use will reduce imprisonment rates.⁵⁴³ Either way, the sanction is at a crossroads and arguably unsustainable in its current form, at least if one’s principal intent is to have it function to reduce the use of imprisonment in Canada.

And so, in terms of the key findings of this project, we start with the ever important “so-what” question. In other words, how does the knowledge gained add to our understanding of conditional sentencing, and how does it assist us in moving forward? In addressing this issue, the following section is organized around three primary themes. The first reviews conditional sentences as (fatally) flawed sanctions and considers the challenges of creating a non-custodial option that is accepted (and used) as a prison alternative. This will include a discussion of similar efforts made in other countries (e.g.,

⁵⁴³ See, generally, Doob, *supra* note 2.

Australia) and the development of a basic model intended to apply "lessons learned" to future endeavours.

The second section discusses the *Sharma* decision out of the Ontario Court of Appeal and anticipates the potential impact of the Supreme Court of Canada weighing in on this issue, as it is expected to do in 2021. After all, whether the Court endorses or removes the restrictions placed on conditional sentences, there is work left to be done. Finally, the third section confronts what is perhaps the bigger picture, the continued lack of clarity in terms of the purposes and principles of sentencing in Canada. This will include an exploration of the potential conflict between calls for "evidence-based" sentencing policy and judicial perceptions of their role in reducing crime through their sentencing decisions.

5.1 Are conditional sentences mortally wounded as tools for prison reduction, or can they be saved?

In some ways, the introduction of conditional sentencing in the mid-1990s reflected a fundamental misreading of the moment. While there were certainly calls for added restraint in the use of incarceration, there were parallel discussions that raised legitimate concerns around proposals to create a new non-custodial sanction for this purpose. These included, but were not limited to, repeated reminders that there would be no financial resources provided for enhanced program needs (at the provincial level), an awareness of the tendency of such efforts to increase, not decrease, the use of imprisonment (through net-widening), and the need to maintain public support in the sentencing regime ultimately put forward.

To complicate matters further, discussions regarding potential new sanctions overlapped with those relating to the need to address longstanding deficiencies in the enforcement provisions of suspended sentences. Several proposals had been considered and, in earlier drafts, the conditional sentence had been framed as an improved alternative to the suspended sentence. Put another way, there was an interest in "fixing" suspended sentences, *and* there was an interest in creating an intermediate sanction that could divert low level offenders from prison. Parliament took a calculated risk in addressing the second but not the first, effectively re-branding the fix for

suspended sentences as a form of imprisonment, and ignoring the warnings given regarding the need for adequate resources and the potential for net-widening.

And so, conditional sentences as originally enacted, were fatally flawed and likely to fail from the start. In the absence of an effective and sustained educational effort, the public (and many judges) struggled to rationalize an oxymoron—imprisonment without incarceration—and to find a place for it within the existing sentencing structure. In many provinces/territories, it became clear early on that the funding necessary for the support and supervision of offenders serving conditional sentences of imprisonment in the community would not be forthcoming. More importantly, in terms of its lack of success as a tool for prison reduction, the precautions taken by the legislators (and further developed in *Proulx*) to ensure that conditional sentences were only considered after a judge had decided to impose a jail term proved to be inadequate.

Conditional sentences looked very much like new and improved suspended sentences. The suggestion that the two sanctions were sufficiently distinguished relied upon three questionable assumptions. The first was that calling something “jail” could transform a non-custodial sanction into some form of imprisonment in the community. There is little reason to believe that offenders, most especially the compliant offender, experience a difference. As several judges noted, whether dealing with bail or sentence, offenders tend to focus almost entirely on whether they will be in, or out, of custody. By extension, what the sanction might be called is, for all intents and purposes, also irrelevant to them. More importantly, the public did not accept the new sanction as the equivalent of a term of imprisonment and responded negatively when it was used for serious offences, precisely those offences that would ensure its success as a mechanism for prison reduction.

The second false assumption was that the punitive nature of conditional sentences, as defined by the inclusion of house arrest or other liberty-restricting conditions, could act as a further separation between the two orders. One of the weaknesses of this argument is that conditional sentences are not necessarily more onerous than suspended sentences. While conditional sentences are sometimes colloquially referred to as “house arrest,” the term is not mandated, and the reality is that judges are more likely to impose curfews on conditional sentences, many of which can

be seen as simply “mimic[king] the conditions of ordinary life.”⁵⁴⁴ More notably, we are seeing post *Voong* the use of suspended sentences that also include house arrest or curfew conditions, further blurring this distinction.

The final challenge relates to the lack of dedicated resources for the support and supervision of offenders in the community. On the support side, efforts to rehabilitate or reintegrate offenders assume that community-based programming is readily available. On the supervision side, to the extent that offenders on conditional sentences represent those with higher “risks” and “needs” (who would otherwise be incarcerated), there was an expectation that vigorous monitoring would be in place. This applies equally to offenders who may be at low risk to reoffend, but who have been placed under house arrest strictly for the purposes of punishment. Such punitive conditions can only act to deter (generally) and denounce to the extent that they are seen as negatively impacting an offender’s daily life. Despite this, most judges indicated that they rarely order electronic monitoring; it is unclear if this will change with the introduction of enhanced technology.

While academics can argue about the degree to which net-widening has occurred, the core question has been answered. Indeed, in the same way that we acknowledge that some conditional sentences represented true diversions from imprisonment, we must also admit that some (or many) did not. In such cases, the imprisonment (upon breach) of offenders bound by longer and stronger conditional sentences operated to undermine the sanction’s primary goal. In BC, and possibly in other provinces/territories, this has frustrated efforts to prioritize the principle of restraint and, ultimately, to reduce overall imprisonment rates. Whether one interprets this as net-mending or net-widening is a matter of perspective. Certainly, a review of the push and pull factors argued to have encouraged the inappropriate application of conditional sentences support the former.

Conditional sentences have allowed judges to impose sentences that give the impression of harshness, without inflicting the harms associated with incarceration. Notably for many judges, the sanction’s facilitated enforcement mechanisms are seen as effective motivators for compliance and, for those interested in direct offender

⁵⁴⁴ *R. v. Higgins*, 2001 MBCA 177 at para 17.

management (e.g., through reviews, applications, or breach hearings), conditional sentences offer an efficient tool. As observed by the sentencing judge in *Galang* (one of the cases dealt with in *Voong*):

Conditional sentences appealed to trial judges. Breaches of the terms of their order can be enforced swiftly, and significant consequences can be imposed promptly. The enforcement procedure is quite simple.⁵⁴⁵

When speaking of the value of conditional sentences, many judges contrasted them favourably with probation and, when asked about evaluating the sanction's effectiveness, most pointed to metrics related to reducing recidivism rather than reducing imprisonment. To paraphrase Bottoms (1981), while the stated goal of s.742.1 was based on the 'avoiding prison' theory, many judges were inclined to use conditional sentences as an alternative to the suspended sentence under a 'special deterrent' theory.⁵⁴⁶ Indeed, it could be argued that by addressing the enforcement challenges of the suspended sentence in the creation of the conditional sentence, Parliament unintentionally invited judges to use the new sanction in this latter fashion, quite possibly violating (or at least compromising) its intended purpose of reducing imprisonment.

Aside from net-widening, conditional sentences also failed to capture any sizable proportion of the overall sentencing caseload. At its peak in BC, for instance, the sanction accounted for approximately 10% of (primary) sentences. This is notable in that it suggests that, even before the introduction of restrictions, conditional sentences were widely available but infrequently used (relative to traditional imprisonment). In its exploration of this issue, this thesis has put forward several push factors as possible explanations for this lack of uptake (e.g., inadequate resourcing, problematic construction). Notably, there is an additional consideration worthy of comment in this area; that is, that terms of imprisonment perform unique functions that are not reproduceable in any community-based form.

Doob (1998) has suggested that part of the challenge of introducing prison alternatives lies in the fact that judges see custodial and non-custodial sanctions, not as interchangeable choices existing on a single continuum but, rather, as notably distinctive

⁵⁴⁵ *R. v. Galang*, 2014 BCPC 0240 at para 30.

⁵⁴⁶ Bottoms, *supra* note 191 at p.9.

options that are designed to accomplish different functions.⁵⁴⁷ Within this model, even a non-custodial sanction that is seen as being punitive may not be sufficiently so. In other words, judges will not use (and the public will not accept) intermediate sanctions in cases that are seen as “requiring imprisonment.” It is more than a matter of severity; it involves symbolic elements and the notion that certain sanctions may be appropriate for some offences, but not others.⁵⁴⁸

The key is in understanding that the act of sentencing an offender includes an important symbolic element (i.e., an expression of values). This has been recognized in the *Criminal Code* through the incorporation of denunciation as an objective of sentencing. Notably, some have argued that it is the need for public condemnation of an offence that acts as the bright line dividing custodial and non-custodial sanction choice.⁵⁴⁹ Put another way, notwithstanding a commitment to restraint, it may be that conditional sentences will never be accepted as appropriate outcomes in certain cases—precisely because, for some offences (or offenders), they simply are unable to “capture our punitive imagination.”⁵⁵⁰ Examples of these situations could include scenarios involving dangerous offenders, offences that for some reason elevate the need for denunciation (e.g., involving violence or a breach of trust), and, possibly, failures to comply with non-custodial court orders.⁵⁵¹ Perhaps, as others have suggested, the answer lies not in finding more effective ways to punish but, rather, in normative change

⁵⁴⁷ Doob, *supra* note 2 at p. 422. See also Doob, A. N., & Marinos, V. (1995). Reconceptualizing punishment: Understanding the limitations on the use of intermediate punishments. *University of Chicago Law School Roundtable*, 2(2), 413–433, at p.414.

⁵⁴⁸ Doob & Marinos, *ibid* at p. 426. More recently, see Webster & Doob, *supra* note 1 at p. 197.

⁵⁴⁹ On this point, see Manson, et al., *supra* note 176 at pp. 538-539.

⁵⁵⁰ Webster & Doob, *supra* note 1 at p. 197.

⁵⁵¹ These scenarios represent, generally, the three justifications put forth as rationales for imprisonment in earlier reports. See Government of Canada, *supra* note 48 at p. 38; Law Reform Commission of Canada, *supra* note 49 at p. 25.

Given the prevalence and growth of administrative (non-compliance) offences, this is an area ripe for reform for those interested in reducing the use of imprisonment. Indeed, much has been done in this area within the last five years, often in the context of bail. See, for example, Deshman & Myers, *supra* note 503; Webster, *supra* note 503; Sylvestre, et al., *supra* note 347, Myers, N. M. (2015). Who said anything about justice? Bail court and the culture of adjournment. *Canadian Journal of Law and Society*. See also *R. v. Antic*, 2017 SCC 27, *R. v. Zora*, 2020 SCC 14, and Bill C-75, *supra* note 27.

that generates reflection regarding how we think about incarceration (as a “bad thing”), and even how we think about punishment itself.⁵⁵²

5.1.1 Learning from the experience of other countries

The use of intermediate sanctions, including those that incorporate concepts of community custody, is certainly not unique to Canadian criminal law.⁵⁵³ Indeed, many Western nations have introduced alternatives to imprisonment in their attempts to reduce the use of custody. Whether successful or not, there are valuable lessons that can be learned and shared across boundaries. To that end, the journal *Law and Contemporary Problems* published a special edition (2019) that focused on the theory and practice of prison alternatives.⁵⁵⁴ Not surprisingly, several of the articles contained therein touch directly on issues raised in this thesis. Notably, the “precarious life” (and eventual demise) of the Australian suspended sentence provides key insights into the challenges of introducing and maintaining effective non-custodial sentencing options.⁵⁵⁵

The Australian suspended sentence

In Australia, the suspended sentence has gone by various names, though its essence is identified as a sentence of imprisonment that is imposed, but whose execution is partially or completely suspended for a prescribed period. The suspended portion of the sentence may have conditions attached, and the sentence may be executed upon non-compliance with conditions, or the commission of a further offence.⁵⁵⁶ The ambiguous nature of the sanction, and the public condemnation provoked by its use in serious cases, suggests many parallels with the Canadian conditional sentence. One of the similarities, for instance, is in its definition, not as an alternative to imprisonment but, rather, as a “substitute for imprisonment.” As Freiberg

⁵⁵² See, for instance, Tonry, M. (2014). Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13, 503–533; Doob, A. N., & Webster, C. M. (2014). Creating the will to change: The challenges of decarceration in the United States. *Criminology & Public Policy*, 13, 547–559; Webster & Doob, *supra* note 75.

⁵⁵³ Roberts, *supra* note 172.

⁵⁵⁴ Gazal-Ayal, O. (Special Edition). (2019). Alternatives to imprisonment (Special issue). *Law and Contemporary Problems*, 82(1).

⁵⁵⁵ Freiberg, A. (2019). Suspended sentences in Australia: Uncertain, unstable, unpopular, and unnecessary? *Law and Contemporary Problems*, 82(1), 81–110, at p. 81.

⁵⁵⁶ *Ibid* at pp. 83–84.

(2019) argues, “the sanction’s ambiguous and paradoxical nature, which made it so appealing to lawyers and offenders, was also its fatal weakness.”⁵⁵⁷

As has been suggested with conditional sentences, the Australian suspended sentence was seen by some as being illogical and fundamentally dishonest. While ranked as equivalent in severity to a term of imprisonment, the sanction clearly served a different function, and struggled to satisfy the more emotional and expressive aspects of sentencing. And indeed, like the Canadian conditional sentence, the effectiveness of the Australian suspended sentence as a mechanism of prison reduction was, at best, unclear. In terms of their overall effect on the use of imprisonment, suspended sentences were generally framed as being inflationary due to net-widening, the likelihood of incarceration upon breach, and the impact of longer (if not stronger) orders.⁵⁵⁸

The death spiral for suspended sentences in some Australian states (e.g., Victoria) was precipitated by its use in a high-profile case that captured widespread attention.⁵⁵⁹ Intense public protests ensued, ultimately resulting in a series of government consultations, papers, and reports. The first set of restrictions (2006) added to the list of factors that judges had to take into account when considering a suspended sentence (e.g., the capacity of such a result to deter and denounce). In 2010, amendments precluded judges from suspending sentence for “serious” offences; in 2011 this was expanded to “significant” offences.⁵⁶⁰ Notwithstanding the limits placed on its use, the suspended sentence remained unpopular and, by 2014, had been abolished in Victoria.⁵⁶¹ In terms of other Australian jurisdictions, Tasmania introduced legislation in

⁵⁵⁷ *Ibid* at p. 83.

⁵⁵⁸ *Ibid* at pp. 93-94. Notably, suspended sentences were also argued to discriminate against Indigenous offenders who, as is the case in Canada, are over-represented in prison populations (p. 90).

⁵⁵⁹ In 2004, for offences related to rape and indecent assault, the Supreme Court of Victoria upheld a sentence of imprisonment of two years and nine months that was suspended for three years (*ibid* at p. 86).

⁵⁶⁰ Serious offences included serious violent offences, sexual offences against children, etc. Significant offences added certain drug offences, and others (*ibid* at p. 87).

⁵⁶¹ Notably, the suspended sentence in Victoria was replaced by a community correction order (CCO) which was also subject to criticism. The CCO could be made as a stand-alone order or in conjunction with a fixed term of imprisonment. Upon proven breach, the order could be varied or cancelled, and the offender could be resentenced on the original offence. In the wake of a 2014

2017 that would have the effect of phasing out suspended sentences and New South Wales abolished the sanction, though the law had not come into effect as of 2019.⁵⁶²

Lessons learned regarding prison alternatives

There are many lessons to be learned through the experiences of others who have attempted to introduce alternative sanctions. After all, hurdles are more easily overcome if they are visible. In their summary of the issues, Gazal-Ayal and Roberts (2019) identify several such obstacles, including short-term benefits that give way to net-widening, resistance from the public and/or legal community, and inadequate resourcing.⁵⁶³

A review of the literature suggests that while prison alternatives may initially act to reduce the use of imprisonment, as time passes, legislatures and the courts can forget the original purpose of the reform and can even, in some cases, change the nature of the sanction that was introduced. The suspended sentence in Israel is offered as an example. Introduced in 1954, the suspended sentence was intended to replace immediate incarceration for first-time offenders who would otherwise be facing imprisonment due to offence severity.⁵⁶⁴

While initially seen as successful in terms of reduced incarceration, amendments enacted in 1963 that allowed for the partial suspension of sentence had the effect of changing the sanction from an alternative that avoided imprisonment, to one that acted

judgment that confirmed CCOs could be used in place of imprisonment, concerns that the response was “soft on crime” were exploited by the opposition party. Ultimately, the maximum term of imprisonment that could be imposed with a CCO was limited to one year, and restrictions were placed on the sanction’s use for some serious offences. As Freiberg (2019) notes, the penal populism that led to the demise of the suspended sentence remained a factor:

Sadly, and possibly inevitably, the measures instituted to replace the suspended sentence have been subjected to the same forces that regard any sentence other than imprisonment as an inadequate response to a wide range of offenses, further driving up imprisonment rates (*ibid* at p. 109).

⁵⁶² *Ibid* at pp. 107-108.

⁵⁶³ Gazal-Ayal, O., & Roberts, J. V. (2019). Alternatives to imprisonment: Recent international developments (Foreword). *Law and Contemporary Problems*, 82, i–ix.

⁵⁶⁴ Emmanuel, N., & Gazal-Ayal, O. (2019). Suspended sentences and service labor in Israel—From alternatives to imprisonment to net-widening. *Law and Contemporary Problems*, 82(1), 111–136, at p. 115. As originally envisioned, a judge would impose a term of imprisonment but then suspend its execution for a prescribed period of time. The order was not supervised, and the only requirement was that the offender not commit a further offence. In the event of a breach, the prison sentence that had been suspended, is activated.

as a supplement to imprisonment (net-widening).⁵⁶⁵ While the authors suggest that intermediate sanctions may still have a role in a principled sentencing structure, they argue against framing them as alternatives to imprisonment. They go on to conclude that “adopting alternatives to imprisonment is not an effective way to reduce incarceration. When the goal is to reduce the use of incarceration, one should probably look for the solution elsewhere.”⁵⁶⁶

Gazal-Ayal and Roberts (2019) offer an additional warning regarding the net-widening tendencies of sanctions introduced as prison alternatives. Noting that net-widening occurs when the introduction of a new community-based sentencing option alters the way that judges use non-custodial sanctions that are already available, the authors suggest that the likelihood of this phenomenon occurring is increased when there are deficiencies (real or perceived) in the existing options.⁵⁶⁷ This warning resonates with the narrative around the conditional sentence, which was introduced at a time when deficiencies in the suspended sentence had already been identified and were also being discussed in Canada.

Notably, in the context of prison alternatives, resistance from the public or legal community is often met with calls for enhanced severity or penal bite. In Canada, this has drawn attention to the need for public education and adequate resourcing. As Gazal-Ayal and Roberts (2019) note, judicial enthusiasm for a sanction is tied, at least in part, to community confidence in it. The lesson to be learned, they suggest, is that “alternatives to imprisonment need to be carefully constructed and sold to the public as an adequate replacement for a term of custody.”⁵⁶⁸ Presumably, this would justify the punitive rhetoric that surrounds conditional sentences, as well as the more restrictive conditions imposed (e.g., house arrest or curfews).⁵⁶⁹

⁵⁶⁵ *Ibid* at pp. 120-121.

⁵⁶⁶ *Ibid* at p. 136.

⁵⁶⁷ Gazal-Ayal & Roberts, *supra* note 563 at p. v.

⁵⁶⁸ *Ibid* at p. vii.

⁵⁶⁹ Frase (2019) offers somewhat of a counter-point in his discussion of the American suspended sentence, suggesting that legislation must guard against excessively long or onerous orders as they create problems in terms of enforcement, proportionality, and net-widening. In terms of order duration and content, for instance, he acknowledges the common-sense truism that the longer an offender is under scrutiny and the more restrictive the conditions by which he or she is bound, the

Perhaps unsurprisingly, a summary of considerations relevant to the successful introduction of prison alternatives draws attention to several key decision points. In their simplest form, these would include ensuring that:

- The concept underlying the new sanction “makes sense” or, at the very least, that it is not nonsensical or paradoxical.
- Prison reduction is the sanction’s only (or sufficiently prioritized) goal—i.e., it is not undermined by a secondary goal that may present a conflict.
- Deficiencies in existing community sanctions have been addressed to avoid net-widening.
- Communication and education plans (for judges, counsel, the public) have been developed.
- Adequate resources are in place for offender support and monitoring.

With these requirements in mind, it is clear that conditional sentences have been fatally flawed as prison reduction strategies since their inception in 1996, and that their diminishment through the enactment of restrictions in 2012 should have been not only reasonably foreseeable, but indeed, expected. Efforts to “save” conditional sentences would require wholesale changes. If seeking to retain the sanction as some sort of prison alternative, reforms to be considered would likely include a reconsideration of its construction (re-branding), the inclusion of mandated (punitive) conditions, the provision of adequate monitoring resources, and a sustained campaign of public education. Even so, it may be necessary to lower the cap on sentence length if we wish to avoid re-creating the circumstances that allowed penal populism to drive policy away from a focus on restraint.

While we may still be able to frame the result as a “reformed (or salvaged) conditional sentence”, the scale of the changes that would be necessary suggests that the preferable route may be to simply start over. Indeed, one of the advantages of doing so is that it would allow for a “clean slate” mentality that would be more conducive to

greater the likelihood that a breach will occur, be discovered, and the offender will be incarcerated. Again, it appears that legislatures can create prison alternatives that trigger some form of punishment only if the offender reoffends, or they can create onerous community-based sanctions with many conditions and efficient enforcement mechanisms that increase the likelihood that offenders will end up incarcerated. See Frase, R. S. (2019). Suspended sentences and free-standing probation orders in U.S. guidelines systems: A survey and assessment. *Law and Contemporary Problems*, 82(1), 51–80, at p. 73.

substantive change in terms of both policies and practices. Webster, Sprott, and Doob (2019) makes such an argument when applying the lessons learned from the successful decarceration experience with youths in Canada, suggesting that the introduction of a brand new law (the *Youth Criminal Justice Act* of 2003), “more effectively opened up space for cultural change than mere tinkering with the prior law. Indeed, it would be expected that almost everything would be different.”⁵⁷⁰

In their foreword, Gazal-Ayal and Roberts (2019) suggest that appellate courts may be able to “address imperfections” found in the legislative definitions of a particular prison alternative.⁵⁷¹ Certainly in the early years of conditional sentencing, the Supreme Court of Canada attempted to perform this function in *Proulx*. More recently (post Bill C-10), there are provincial appellate decisions that have had the effect of salvaging the spirit of conditional sentences, even if not in name (most obviously *Voong*). In terms of the future of conditional sentencing, however, there may be no case more potentially consequential than *Sharma*, a decision out of the Ontario Court of Appeal that is currently (as of May 2021) pending before the Supreme Court of Canada.

5.2 The Ontario Court of Appeal elevates the debate

The issue in *Sharma* is not whether a suspended sentence can be justified for an offence no longer eligible for conditional sentencing but, rather, whether the statutory restrictions themselves represent infringements of constitutionally protected rights—under sections 7 (liberty) and 15 (equality) of the *Charter*.⁵⁷² Until recently (2020), *Charter* challenges to the conditional sentencing restrictions had failed, largely due to

⁵⁷⁰ Webster, Doob & Sprott, *supra* note 75 at p. 1111. Webster (2015) makes a similar argument in the context of bail reform, framing both the *Bail Reform Act* of 1971 and the *Youth Criminal Justice Act* of 2003 as examples of successful decarceration efforts. See Webster, *supra* note 503 at p. 12.

⁵⁷¹ Gazal-Ayal & Roberts, *supra* note 563 at p. ix.

⁵⁷² *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

the continued availability of suspended sentences.⁵⁷³ This changed with *Sharma*.⁵⁷⁴ At the Ontario Court of Appeal, Ms. Sharma argued that the restrictions that precluded conditional sentences for offences prosecuted by indictment in which the maximum term of imprisonment is 14 years or life, or for offences prosecuted by indictment involving the import, export, trafficking or production of drugs, where the maximum term of imprisonment is 10 years, were unconstitutional in that they infringed both her section 15 rights (by discriminating on the basis of race), and her section 7 rights (by being overbroad and arbitrary).⁵⁷⁵ In a two-to-one decision released in 2020, the Court accepted both arguments, declaring the relevant restrictions to be of no force or effect, effective immediately.⁵⁷⁶

In terms of the suggestion that the continued availability of suspended sentences lessened the impact of the loss of conditional sentences, the majority disagreed with the sentencing judge's conclusion that other appellate courts, including the BC Court of Appeal, had accepted that a suspended sentence and probation is an appropriate alternative to a conditional sentence.⁵⁷⁷ They specifically noted that "[i]n *Voong*, the

⁵⁷³ See, for instance, the rationale of Hill J. in *R. v. Sawh*, 2016 ONSC 7797, a case in which the Court rejected a section 12 challenge to the conditional sentencing restrictions:

The difficulty with this argument is that it fails to recognize that s. 742.1(c) does not require the imposition of a minimum custodial sentence... It merely removes a conditional sentence as an available disposition. In exceptional circumstances... a court could ...suspend the passing of sentence and impose a period of probation with appropriate terms (*Sawh* at para 46).

On the issue of *Charter* challenges to the conditional sentencing restrictions, see also *R. v. Neary* 2017 SKCA 29 (challenges under ss. 7 and 12 dismissed).

⁵⁷⁴ Ms. Sharma, an Aboriginal woman sentenced after pleading guilty to importing cocaine into Canada, was 20 years old at the time of the offence. In the lower court, Ms. Sharma challenged both the mandatory minimum sentence (two years) attached to the offence, and the conditional sentence restrictions that would be activated should the MMP be struck. The sentencing judge struck down the MMP, ruling it violated section 12 protections (*Sharma*, *supra* note 4).

In terms of the conditional sentencing restrictions, the judge dismissed the *Charter* challenge under s. 15, in part because suspended sentences with probation remained available. Ms. Sharma was sentenced to 18 months imprisonment (*R. v. Sharma*, 2018 ONSC 1141).

⁵⁷⁵ *Sharma*, *supra* note 4 at para 27.

⁵⁷⁶ Sections 742.1(c) and 742.1(e)(2). The Court found that these restrictions "deny the benefit of a conditional sentence in a manner that has the effect of reinforcing, perpetuating or exacerbating the disadvantage of Aboriginal offenders," therefore violating s. 15 (para 132); the s. 7 infringement was rooted in the findings of overbreadth, and the lack of connection between the purpose of the provisions and some of their effects (*ibid* at para 174).

⁵⁷⁷ The sentencing judge supported this conclusion by referencing *Neary*, *supra* 573, *R. v. Dickey*, 2016 BCCA 177, *Voong*, *supra* note 34, and *R. v. Elliott*, 2017 BCCA 214.

[BCCA] expressly acknowledged that it is a legal error to simply substitute a suspended sentence for a conditional sentence, as the two types of sentence are governed by different principles.”⁵⁷⁸ The Ontario Court of Appeal went on to clarify that conditional sentences and suspended sentences are neither equivalent, nor interchangeable.⁵⁷⁹ If a conditional sentence would have been appropriate (if available), then a suspended sentence would not. Having found that the sentencing judge erred, the Court proceeded to set aside the prison term, substituting it with a conditional sentence of 24 months less one day.⁵⁸⁰

Writing in dissent, Miller J.A. accepted the conditional sentencing restrictions as “an exercise of one of Parliament’s most important functions—setting the boundaries of the adequate and necessary penalties for crimes.”⁵⁸¹ The dissenting reasons focused on the section 15 argument, suggesting that, if the majority’s rationale were to be taken to its logical conclusion, “[n]othing short of unlimited availability of conditional sentences for all Aboriginal offenders, for all offences, would suffice.” Miller J.A. struggled to square such an outcome, noting that “Parliament was under no constitutional obligation to establish a conditional sentence regime in the first place.”⁵⁸²

The issue was whether Parliament is entitled to decide that some offences, or categories of offences, should always result in incarceration, regardless of who commits them or in which circumstances. The dissent responded affirmatively, acknowledging that Parliament’s decision may have been harsh, even mistaken (or unwise), “[b]ut it is not for any of these reasons discriminatory.”⁵⁸³ Miller J.A. framed Parliament’s purpose

⁵⁷⁸ *Sharma*, *supra* 4 at para 122 (citing *Voong*, *supra* note 34 at para 62).

⁵⁷⁹ As established in *Proulx*, a conditional sentence is a jail sentence served in the community and can therefore serve the objectives of denunciation and deterrence; not so with a suspended sentence, which is intended to promote rehabilitation and is generally used when “deterrence and denunciation are not needed for the particular offender in the particular circumstances or where there are exceptional circumstances” (*ibid* at para 110). The Ontario Court of Appeal also noted that suspended sentences are “unreliable as an alternative to incarceration” given the inconsistent application of exceptional circumstances that often excludes many marginalized offenders, including Aboriginal offenders and especially Aboriginal women” (paras 116 and 117).

⁵⁸⁰ Given that Ms. Sharma had already served her prison sentence, no further time on a conditional sentence was ordered.

⁵⁸¹ *Ibid* at para 192.

⁵⁸² *Ibid* at para 241.

⁵⁸³ *Ibid* at para 260. If mistaken, Miller, J.A. found the infringement justifiable under section 1 in any event.

in enacting the legislation as being “to ensure that offenders who commit serious crimes do not receive what Parliament has determined to be an excessively lenient sentence.” It is a normative proposition—that certain offences require more severe punishment than a conditional sentence provides:

Reasonable people may disagree as to whether this is a good policy judgment or a poor one. That is to be expected. This disagreement may give rise to further legislative change. But the question is for Parliament, not the court.⁵⁸⁴

On the section 7 issue, Miller J.A. disagreed only with the majority’s conclusion that the legislation is overbroad, accepting instead that the decision to link offence seriousness to the maximum penalty prescribed by legislation was sufficiently linked to the purpose of the restrictions imposed. “I would not subordinate Parliament’s assessment of the seriousness of these offences to my own.”⁵⁸⁵

5.2.1 The potential impacts of *Sharma* – options for the SCC

Though no hearing date has been set for *Sharma*, this in no way inhibits our ability to speculate on the potential impact(s) the decision may have. While, admittedly, the Court is not restricted to a “thumbs-up” or “thumbs-down” vote in this case, for the purpose of illustration, the following section addresses the issues raised in the event the decision is simply upheld or reversed. In the bigger picture, it is worth noting that *Sharma* is not the solution to the problem of sentencing restrictions imposed by Parliament. Indeed, the creation of law and broad sentencing policy should properly be a function, not of the courts but, rather, of Parliament.⁵⁸⁶

Potential consequences of *Sharma* being upheld

If the Supreme Court of Canada follows the Ontario Court of Appeal, the restrictions contained in sections 742.1(c) and 742.1(e)(2) would be declared to be of no force or effect nation-wide. As a result, two of the conditions that preclude the imposition

⁵⁸⁴ *Ibid* at para 280.

⁵⁸⁵ *Ibid* at para 283. And so, in dissent, Miller J.A. would dismiss the appeal, having found that the restrictions placed on conditional sentencing by sections 742.1(c) and 742.1(e)(ii) do not infringe the appellant’s rights under either section 15(1) or 7 of the *Charter*.

⁵⁸⁶ On this point, see Shanmuganathan, J. (2016). *R. v. Nur*: A positive step but not the solution to the problem of mandatory minimums in Canada. *Supreme Court Law Review* (2d), 76, 329–349.

of a conditional sentence would be removed.⁵⁸⁷ More specifically, offences would no longer be ineligible solely because they involve: 1) offences prosecuted by indictment for which the maximum term of imprisonment is 14 years or life; or 2) offences prosecuted by indictment for which the maximum term of imprisonment is 10 years, that involve the importing, exporting, trafficking or production of drugs.

While this would be well received by some, it would also raise new challenges. The first is that it would result in a sentencing regime that is even more confusing and complex than it is presently. For those who already criticize Canadian criminal law as being the product of “ad-hocery,” it would provide yet another example of a change that is inconsistent with the remaining provisions. Indeed, while a conditional sentence would be available for an offender convicted of importing or trafficking in Schedule I drugs, it would remain unavailable for an offender convicted of motor vehicle theft or theft over \$5,000, if prosecuted by indictment. Not only would such a result inject a layer of unnecessary incoherence into the provisions of section 742.1, but it would also potentially offend the fundamental principle of proportionality at sentencing.

A second concern is that it leaves the court vulnerable to accusations of activism, effectively re-opening the debate around which agency in Canada is best positioned to establish broad sentencing policy. Indeed, in that sense, the respective roles of parliament and the courts remain largely unresolved. Notably, the Canadian Sentencing Commission (CSC) took the position that penal policy should be made by elected officials—legislative bodies that possess a national perspective and have the resources necessary to create comprehensive and integrated policy for all offences. As the Commission noted,

Courts are primarily a reactive institution. They cannot initiate policy and must solve problems as they arise. ...To expect that a uniform approach to sentencing can be developed with clarity and consistency by ten different courts is to over-simplify the complexity of the task of sentencing.⁵⁸⁸

⁵⁸⁷ To be clear, the remaining restrictions on the use of conditional sentences would still apply and are not the subject of this appeal.

⁵⁸⁸ CSC, *supra* note 38 at p. 85.

While decisions of the Supreme Court of Canada are binding on all lower courts, the high court does not regularly hear appeals on sentencing matters.⁵⁸⁹ Even if we could imagine a world in which it regularly dealt with sentence appeals to provide unifying guidance, we would want to proceed with caution. Courts must always be mindful of perceptions when purporting to interpret or apply legislation in a way that substantively expands their own discretion. When broad sentencing policy is established through appellate review, it can be more a reflection of (unelected) judicial policy preferences than one informed by principles and a consideration of social facts. While required to intervene in specific cases, the judiciary lacks the time, budget, resources, and expertise to set broad social policy. As Manfredi (2005) noted, while the courts could be provided with this capacity, that would effectively “erode the institutional differences between courts and other political institutions that justify judicial review in the first place.”⁵⁹⁰

Finally, the most substantive challenge to simply removing the restrictions is that doing so, without resolving the concerns that led to the section 742.1 limitations, would risk pushing Canadian sentencing policy back at least a decade. And, while some may welcome the return to a time in which judges exercised greater discretion, it was also a time of considerable controversy in terms of conditional sentences. Most notably, the sanction was not generally accepted as a term of imprisonment and was the subject of public and community resistance when used in serious cases. While Harper’s conservative government can certainly be criticized for having politicized sentencing policy, that it was able to do so (with little resistance) says something about the crisis of confidence that existed at the time in terms of public perceptions of established sentencing practices.

To ignore these facts while removing restrictions risks a return to the angry headlines that fueled penal populism in the mid-2000s. And in the absence of substantive reforms, there is no reason to expect a different result; that is, the eventual calls for restrictions or abolition. Indeed, any interest in avoiding the inevitable would

⁵⁸⁹ “As a matter of established practice and sound policy, this Court rarely hears appeals relating to sentences.” *Proulx*, *supra* note 14 at para 2.

⁵⁹⁰ Manfredi, C. P. (2005). *Deja vu all over again: Chaoulli and the limits of judicial policymaking*. In C. M. Flood, K. Roach & L. Sossin (Eds.), *Access to care, access to justice: The legal debate over private health insurance in Canada*. Toronto: University of Toronto Press, at p. 154.

require change in several areas that are under government (not judicial) control. At the very least, the lifting of restrictions should trigger a broad review of conditional sentences in terms of their purpose and value, if any, as prison alternatives. It may be, for instance, that the sanction has produced disappointing results in terms of prison reduction but has provided an effective form of net-mending and can be justified as being responsive (rightly or wrongly) to the needs of sentencing judges within the current sentencing model.

Potential consequences of *Sharma* being reversed

The Ontario Court of Appeal considered, and then explicitly rejected, the notion that there was any interchangeability between suspended and conditional sentences, confirming that if a conditional sentence would have been appropriate, then a suspended sentence would not. In its repudiation of such practices, the Court went on to explain that in *Voong*, the BC Court of Appeal had not endorsed the use of suspended sentences as alternatives to conditional sentences, essentially because that Court had declared that it would be a legal error to do so. And yet, neither court addresses the obvious question; that is, would the court be contorting itself to get to a suspended sentence if a conditional sentence remained available? Indeed, as the sentencing judge in *Galang* (one of the cases dealt with in *Voong*) acknowledged, “[w]hen conditional sentences were available for this type of offence, there was no practical reason for an accused to seek a suspended sentence.”⁵⁹¹

If the Supreme Court of Canada reverses *Sharma*, the restrictions contained in sections 742.1(c) and 742.1(e)(2) would be re-instated (in Ontario) and we would return to the post Bill C-10 *status quo*, which is not necessarily a comfortable place to land. While the decision would resolve the constitutional issue, it is equally important that the Court provide guidance to judges regarding the use of suspended sentences (or other alternatives) in cases in which conditional sentences are no longer available. This could include direction regarding the applicability of the exceptional circumstances doctrine but should also offer much needed clarification on the nature of probation and the appropriateness of attaching what would otherwise be considered punitive conditions to

⁵⁹¹ *Galang*, *supra* note 545 at para 29.

orders that (coincidentally) are being imposed for offences that used to attract conditional sentences.

We cannot lose sight of the fact that conditional sentences appealed to many trial judges. The sanction gave the appearance of punitiveness without subjecting offenders to the negative consequences of actual imprisonment (“doing less harm”). The factors leading to the sanction becoming problematic in terms of prison reduction, however, may be tied to the other (unintended) end of the spectrum—that is, “doing more good.” The following section explores this issue through a consideration of judicial perceptions regarding the purpose of sentencing and, indeed, their role as sentencing judges.

5.3 The bigger picture – reconsidering judicial roles and the purposes & principles of sentencing

Criminal justice policy in Canada has long distanced itself from the idea that judges can, through sentencing, reduce crime. As discussed in an earlier chapter (1.2.1), custodial sentences are considered more likely to increase (not decrease) the likelihood that a person will reoffend, and even non-custodial programming has tended to produce under-whelming results. At best, studies suggest that in certain circumstances, some programs may reduce reoffending by some degree in some offender groups. Notwithstanding the lack of a solid evidentiary foundation, there is a certain appeal to the notion that the justice system can transform offenders into law-abiding citizens. Notably, successive governments have failed to provide clear guidance to judges on this issue, choosing instead to perpetuate the belief that the purpose of sentencing is to “protect society” (s. 718), and that judges can achieve this purpose by imposing sentences that act to reduce future crime.⁵⁹²

In fact, viewing sentencing decisions through the lens of doing “less harm” and/or “more good” (to offenders) is another way in which we can better understand the factors that influence judges, especially those who have adopted a crime-fighting or crime-reducing role. In the early years of conditional sentencing, this manifested in the use of the sanction as robust probation (doing more good) and was justified by the belief that the immediate threat of imprisonment would promote compliance with conditions

⁵⁹² Doob argues that the purpose of sentencing should be honest and realistic in terms of what can (and cannot) be achieved. See Doob, *supra* note 171 at pp. 10-12.

imposed, often for the individual offender's own good. In the wake of the restrictions imposed by Bill C-10, we saw this in decisions that circumvented the sentencing restrictions (doing less harm) and were justified by the belief that imprisoning offenders, especially those who may be dealing with up-tariffed offences, will increase the likelihood that they will reoffend upon release.

5.3.1 Judges as protectors of society

Doing more good – conditional sentences as robust probation

The notion that (at least some) judges view themselves as protectors of society or crime fighters offers yet another explanation for the failure of conditional sentences as prison alternatives. Again, initially many judges saw the sanction as being more enforceable than a suspended sentence and, by extension, likely more effective than probation attached to another sanction (e.g., a short jail term). Indeed, the imposition of conditional sentences in such instances likely accounts for much of the net-widening suggested by these findings. After all, it should not be surprising that judges who saw their role as being to reduce crime—e.g., by “fixing” offenders—were drawn to a non-custodial option that provided great latitude in terms of the imposition of optional conditions, the possibility of tight control in the community, and a facilitated breach process that was expected to promote compliance.

And so, in the wake of *Proulx* and its elevation of sentencing objectives relating to crime reduction,⁵⁹³ we saw longer and stronger conditional sentences, many with numerous treatment-oriented requirements.⁵⁹⁴ However, such orders can be problematic, notwithstanding good intentions. Notably, for instance, offenders dealing with significant substance abuse or mental health issues are at higher risk of technical breaches (i.e., non-compliance with conditions)⁵⁹⁵ and chronic (repeat) offenders are at a higher risk of future offending. To the extent that monitoring occurs, and proven

⁵⁹³ To be clear, crime reduction in this context relates to reduced recidivism attributable to offender rehabilitation (“doing more good”), rather than to the avoidance of the negative (criminogenic) consequences of incarceration (“doing less harm”).

⁵⁹⁴ Similar issues are raised when conditional sentences are imposed with strong deterrence-oriented requirements—e.g., home confinement, no alcohol, etc.

⁵⁹⁵ This factor may offer a partial explanation for the imposition of curfews (instead of house arrest) and the tendency of judges not to include electronic monitoring.

breaches are dealt with harshly, this may ultimately translate into the imprisonment of more offenders.

Given the current purposes and principles of sentencing, however, it is difficult to criticize judges for pursuing codified objectives designed to reduce reoffending—for trying to do more good. They act, after all, under the authority of legislation, as it has been interpreted and applied by the appellate courts, including the Supreme Court of Canada.⁵⁹⁶ Yet, there is an apparent disconnect between judges who craft individualized sentences designed to address criminogenic factors, and the bulk of social science research that tells them they are not likely to get the outcome they seek. For instance, in a research project that focused on differences between Indigenous (n=749) and Caucasian (n=6,816) offenders serving conditional sentences in BC between 1996 and 2015, the authors reported recidivism rates of 53.5% and 48.4%, respectively.⁵⁹⁷

Notably, the apparent disconnect may be linked to modern-day efforts to reintroduce rehabilitation as an “animating principle” of criminal justice (referred to as “neorehabilitationism”).⁵⁹⁸ Purportedly evidence-based, this approach encourages the application of findings from social science research to correctional practices.⁵⁹⁹ Indeed,

⁵⁹⁶ See the principles and purposes of sentencing as set out in sections 718 to 718.21; on this issue, see *Proulx*, *supra* note 14 and the inclusion of both prison reduction and crime reduction objectives for conditional sentencing.

⁵⁹⁷ Note that recidivism was defined as a new conviction (excluding breaches) occurring within two years of the start of the conditional sentence. See Gutierrez, L., & Chadwick, N. (2020). Are conditional sentence orders used differently for Indigenous offenders? A comparison of sentences and outcomes in Canada. *Canadian Journal of Criminology & Criminal Justice*, 62(4), 1–29, at p. 18.

These findings are not referenced to support conditional sentences as either more (or less) likely to reduce recidivism than other sanctions (e.g., prison). The point being made is simply that for judges who define success as offenders who do not recidivate, approximately half of the conditional sentences imposed in BC between 1996 and 2015 failed to achieve this outcome.

⁵⁹⁸ Klingele, C. (2016). The promises and perils of evidence-based corrections. *Notre Dame Law Review*, 91(2), 537–584, at p. 568.

⁵⁹⁹ Klingele (2016) describes two strains of neorehabilitationism. The first is humanitarian, a form that supports the pursuit of rehabilitative aims regardless of the success of treatment effects. Humanitarian neorehabilitationists value rehabilitation as a philosophical approach that can soften otherwise harsh penalties that disproportionately impact marginalized populations (e.g., drug treatment and other specialized courts).

Scientific neorehabilitationism, on the other hand, focuses primarily on reducing the likelihood that a particular offender will reoffend. Arguably more realistic than the rehabilitative approaches of the early 20th century, proponents maintain a belief that the problems associated with criminality can be identified and “cured” through the application of science. *Ibid* at p. 569.

the emergence and proliferation of specialized and problem-solving courts are linked to this movement. There are at least two challenges associated with returning to (or continuing with) such a model. First, there are relatively few methodologically sound studies on the effects of various criminal justice interventions. Involved agencies (e.g., police, courts, corrections) do not necessarily collect (or share) the types of data required for evaluative research, and programs rarely remain stable long enough for review.⁶⁰⁰ As a result, efforts to pursue evidence-based correctional practices have tended to apply “core principles” derived from a small body of research (e.g., the use of actuarial risk prediction instruments designed to assess offender risks and needs).⁶⁰¹

Second, the rehabilitative ideal tends to be associated with lengthy periods of court ordered community supervision, within which offenders are often required to comply with potentially onerous conditions. As Klingele (2016) points out, in some cases (e.g., drug addicted offenders being required not to possess or consume drugs), there can be a sense that offenders are being set-up to fail. Indeed, one of the sustained critiques of such practices has been that, instead of helping offenders, conditions imposed under the umbrella of offender rehabilitation can act to further marginalize, and even harm them. Put another way, instead of reducing “the reach of the penal state,” they “facilitate its growth.”⁶⁰²

For these (and other) reasons, Klingele (2013) expresses skepticism regarding efforts to use prison alternatives at the sentencing stage.⁶⁰³ Even when imposed under the mantle of rehabilitation, community sentences are not benign and can result in an offender being subject to more control over a longer period. And so, while acknowledging the intuitive appeal of community sentences (e.g., to judges, lawyers, and offenders), Klingele promotes placing limits upon their utilization. Notably, she argues that if a judge concludes a non-custodial sanction is appropriate, he or she

⁶⁰⁰ See Klingele, *ibid* at pp. 555-562; Slinger, E., & Roesch, R. (2010). Problem-solving courts in Canada: A review and a call for empirically-based evaluation methods. *International Journal of Law and Psychiatry*, 33, 258–264.

⁶⁰¹ Klingele, *ibid* at p. 559. The author also refers to the use of behaviour management techniques and engaging pro-social community members and resources (p. 560).

⁶⁰² *Ibid* at p. 584.

⁶⁰³ Notably, Klingele suggests that since a sentence involving community supervision also carries the threat of incarceration, it is not a true alternative to imprisonment but rather a “delayed form of [imprisonment].” See Klingele, C. (2013). Rethinking the use of community supervision. *Journal of Criminal Law & Criminology*, 103(4), 1015–1069, at p. 1015.

should choose one that does not put an offender *at risk of imprisonment*, suggesting that a fine or short jail term may be fairer than a “certain-to-fail” community sentence. Alternatively, where a community-based sentence is selected, the principle of restraint should inform its overall use, the inclusion of conditions, and the length of term (duration).⁶⁰⁴

And yet, a gap remains—between what judges believe they are accomplishing and what studies that focus on outcomes can support. This disconnect can perhaps be best understood as a matter of scale. On the one hand, researchers and analysts tend to operate at the macro level, working with large (faceless) numbers and statistical probabilities. Judges, on the other hand, do their work at the individual (micro) level, often dealing with sympathetic (“sad”) offenders who are disadvantaged and/or marginalized. In such cases, there can be a strong temptation to problem-solve and to believe that you are making a positive difference, even when doing so may not ultimately be in an offender’s long-term best interest.⁶⁰⁵

Doing less harm – circumventing the restrictions placed on conditional sentences

The restrictions placed on the use of conditional sentences represented a substantial departure from established practice and, as such, were expected to result in noticeable increases in the use of imprisonment. Given the relative stability of imprisonment rates in Canada, however, it is possible that the anticipated negative

⁶⁰⁴ *Ibid* at p. 1055. Ultimately, Klingele adopts a normative position, arguing that significant and sustained reductions in the use of imprisonment will only be realized when we, as a society, decide that “reducing the scale of the penal state is the right thing to do.” Klingele, *supra* note 598 at p. 584.

⁶⁰⁵ For instance, if the focus were simply on imposing proportional sentences, a homeless and drug-addicted, chronic petty offender might be facing a short (e.g., less than 60-day) jail sentence. In an effort to address “root causes”, however, a compassionate sentencing judge might choose, instead, to impose a six-month conditional sentence that mandates a curfew, drug treatment, abstention from drugs, and an area restriction (from the area in which drugs are known to be trafficked), perhaps even followed by probation to allow an extended term of support and supervision. Notably, while such a sentence may appear to be more lenient than a short period of incarceration, it leaves the offender at risk of imprisonment for a much longer period of time.

Two of the judges interviewed addressed this general issue from their (earlier) point of view as defence counsel. Judge T spoke of his/her frustration when dealing with clients who saw such an order as a “get out of jail free card” without understanding the more serious ramifications that they would be subject to when they breached. Similarly, Judge F recalled recommending the fixed jail term in such situations, saying ““I would tell them I could pitch 45 days and I think the judge will buy it, because I think you’re going to blow it on a CSO.”

impacts of Bill C-10 were partially muted by judges who found ways to get around amendments thought to be fundamentally inconsistent with an entrenched sentencing culture that prioritizes restraint.⁶⁰⁶

Notably, the Bill C-10 amendments put judges in the awkward position of having to reconcile contradictory statutory directions. On the one hand, the 1996 reforms (Bill C-41) promoted restraint and encouraged the increased use of community-based sentencing alternatives.⁶⁰⁷ On the other hand, the 2012 amendments signalled a return to a tough-on-crime model that saw non-custodial sanctions as inappropriate responses, especially to more serious offences. Indeed, while the principle of restraint remained enshrined in sentencing law, the discretion necessary to give meaningful consideration to it had been largely removed.⁶⁰⁸

⁶⁰⁶ Doob & Webster, *supra* note 80(c) at p. 362.

⁶⁰⁷ This was confirmed by the SCC in *Proulx*, where the Court interpreted Bill C-41 as sending “a clear message to all Canadian judges that too many people are sent to prison” and explicitly framed conditional sentences as Parliament’s attempt to remedy “the problem of over incarceration” (*supra* note 14 at para 1).

⁶⁰⁸ In considering the dilemma faced by judges who perceive a conflict between upholding the rule of law and the duty to dispense justice as they see it, Pomerance (2013) explored three possible responses. The first was that the judge could simply apply the law “without personal comment.” The second envisioned the judge similarly applying the law, but, while doing so, also expressing his/her condemnation of it. Finally, the third option was for the judge to not apply the law, effectively abdicating his/her responsibility to do so (Pomerance, *supra* note 3 at p. 308).

Notably, the three options provided by Pomerance suggest a rigidity that does not exist in most sentencing law, namely that the choice is to apply the law or to not apply the law. The reality is that there are shades of grey between these choices.

In their consideration of this issue, Doob and Webster (2016) identify three options for judges dealing with cases in which a strict application of the law may result in unfair or disproportionately harsh outcomes. The first is to use the *Charter* to have laws declared unconstitutional, something that we have certainly seen with many of the mandatory minimum penalties introduced by Bill C-10 and, more recently, with respect to the restrictions placed on conditional sentencing.

In terms of mandatory minimum penalties (MMPs), efforts to use the *Charter* to have specific provisions declared unconstitutional have been relatively successful. See table regularly updated by “Rangeindr” database, online at: <https://mms.watch/>. Similar challenges regarding conditional sentencing were not initially successful. See, for instance, *Sawh*, *supra* note 573.

The second involves judges giving a creative or “benevolent interpretation” to the statute, and the third is to disregard parliamentary intention and compensate for the unfairness by adjusting the sentence elsewhere (Doob & Webster, *supra* note 80(c) at p. 403). In the context of the conditional sentencing restrictions, the grey area (between applying the law, or not) has included finding ways to get around the intention of the legislation while still appearing to comply with its literal meaning. Such practices fit neatly within the second option identified by Doob and Webster; that is, being creative and interpreting the law benevolently, wherever possible.

And so, we should not be shocked by judges' willingness to circumvent the 2012 restrictions on conditional sentences of imprisonment. In fact, it would not be the first time that judicial resistance strategies have been used in Canadian criminal law. Two recent and relevant examples make the point. The first relates to the judicial response to the mandatory federal victim surcharge, the second to elements of the *Truth in Sentencing Act*⁶⁰⁹ that impacted calculations of credit for time served on remand. In both instances, Canadian judges employed strategies of "creative interpretation" or "sentence adjustment" to get around requirements seen as being unfair or excessively punitive.

The federal victim surcharge

Introduced in 1988, the federal victim surcharge is imposed at the time of sentencing. As of 2012, the surcharge (s. 737) was set at 15% of any fine, or, if no fine was imposed, \$50 for each summary conviction offence and \$100 for each indictable offence. Up until 2012, judges had the discretion to waive the surcharge in cases in which its imposition would cause undue hardship, and they regularly did so. This discretion was removed in 2013 and the amounts payable were effectively doubled at that time.⁶¹⁰

The decision to force judges to impose a financial penalty on every offender was not well received. Notably, a Department of Justice review identified several creative judicial responses. They included: 1) imposing the surcharge but giving no time to pay (default prison time of one-day would be noted as served); 2) imposing the surcharge but then allowing an extraordinarily long time to pay—e.g., 100 years; or 3) imposing a nominal fine (e.g., \$1) to reduce the amount of the surcharge, which is calculated as 30% of the fine.⁶¹¹

In 2018, the controversial surcharge provision was declared of no force and effect by the Supreme Court of Canada. In its decision, the Court commented critically

⁶⁰⁹ Bill C-25, *An Act to amend the Criminal Code (limiting credit for time spent in pre-sentencing custody)*, 2nd Sess., 40th Parl., 2009, was proclaimed into force on February 22, 2010. Short title - *Truth in Sentencing Act*, S.C. 2009, c.29.

⁶¹⁰ Bill C-37 - *Increasing Offenders' Accountability for Victims Act*, S.C. 2013, c 11.

⁶¹¹ On this issue, see Law, M. A. (2016). *The federal victim surcharge: The 2013 amendments and their implications in nine jurisdictions (Final Report)* (p. 46). Ottawa, Canada: Minister of Justice and Attorney General of Canada.

on the practice of imposing a nominal fine as a way of reducing the surcharge payable, noting that such practices ignore legislative intent. As Martin J. explained, “it is more principled for this Court to either strike down the victim surcharge as unconstitutional, or to uphold its constitutionality and require judges to impose it in all cases as Parliament clearly intended.”⁶¹² The following year, Parliament responded by including alternate wording that returned discretion to the sentencing judge as part of Bill C-75.⁶¹³

Limiting credit for time served

Prior to the 2010 enactment of the *Truth in Sentencing Act* (Bill C-25),⁶¹⁴ the long-standing practice in Canada was to grant offenders 2:1 credit for time spent in custody prior to sentencing.⁶¹⁵ This practice was consistent with earlier legislation that provided only general guidance to sentencing judges, allowing them to take into account any time spent in custody by the person as a result of the offence. Bill C-25 added the following restrictive language: “the court shall limit any credit for that time to a maximum of one day for each day spent in custody,” though it also allowed for the crediting of 1.5 days for each day “if the circumstances justify it” and the time spent on remand was not related to the accused’s criminal record or to a failure to comply with bail conditions (s. 719(3.1)).

The new provisions restricted judicial discretion, ignored the entrenched culture, and resulted in a system of credit that was widely seen as being neither fair, nor equitable.⁶¹⁶ The 1:1 regime meant that an accused person who was denied bail prior to sentencing spent more time in custody post-sentence than an offender convicted of the

⁶¹² *R. v. Boudreault*, 2018 SCC 58, at para 92.

⁶¹³ Bill C-75, *supra* note 27. The current wording of s.737(2.1) allows judges to order that an offender pay no surcharge, or to pay a lesser amount if satisfied that the surcharge: a) would cause undue hardship to the offender; or b) would be disproportionate to the gravity of the offence or the degree of responsibility of the offender.

⁶¹⁴ Bill C-25, *supra* note 609.

⁶¹⁵ In the absence of a legislated formula, a practice developed whereby offenders were given 1.5 to 2.0 days credit for each day spent in pre-sentence custody. This enhanced credit recognized two major differences between time spent on remand and time spent serving a sentence. First, other than life sentences, remand time (‘dead time’) is not considered when calculating an offender’s eligibility for remission, parole or statutory release. Second, accused persons in remand facilities generally face harsher conditions, and are often unable to access programming that is available to sentenced offenders (e.g., educational, or rehabilitative programs). See *R. v. Wust*, 2000 SCC 18.

⁶¹⁶ See Doob & Webster, *supra* note 305(a).

same (or similar) offence who was initially released but then sentenced to an equal term of incarceration. The provisions were seen by many as politically motivated:

Unfortunately for those serving time in pre-sentence custody (and for those of us who continue to defend the normative principles of proportionality, parity, and fairness at sentencing), such politically motivated decisions are an indication of the government's criminal justice priorities.⁶¹⁷

Notably, strategies adopted by lower courts to ameliorate unfair outcomes were ultimately endorsed by the Supreme Court of Canada. Indeed, in 2014, the Court creatively applied rules of statutory construction to effectively reverse the legislative assumption that 1:1 credit was to be the rule and 1.5:1 the exception.⁶¹⁸ Parliament subsequently responded by enacting legislation that softened the restrictions that had been placed on judicial discretion.⁶¹⁹

Circumvention in the context of Bill C-10

The extent to which circumvention occurs is related to the degree of divergence or discontinuity with established theory and practice. In that respect, the comments of Judge “I” (in the context of the sentencing restrictions) are instructive. Comparing the complexity of the sentencing exercise to the nuanced task of engineering a soundboard, he/she explained that:

Maybe we bump up the decibel level a little bit on specific deterrence because this person has offended a number of times in a similar way in the past. Whereas in another matter where it's a first offender maybe we slide down the soundboard on specific deterrence because they have demonstrated an ability to live a responsible law-abiding life and this seems to be a one off. So, I look at it as being a constant sliding with each case...We bump down a little bit on rehabilitation [in cases where an offender] appears to be rehabilitated. I always have that visual in my head.

This judge expressed frustration regarding the inflexibility introduced in 2012.

Elaborating on the soundboard analogy, the judge explained that “we do these little

⁶¹⁷ *Ibid* at p. 390.

⁶¹⁸ *Summers*, *supra* note 520. Noting that to do otherwise would be incompatible with the principles of parity and proportionality, the Court defined “circumstances” broadly to include loss of eligibility for early release or parole (at paras 61-68).

⁶¹⁹ Judicial discretion to determine “if the circumstances justify [1.5:1]” was returned with an amendment that went into effect December of 2018. Bill C-51 – *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c.29. See also *R. v. Safarzadeh-Markali*, 2016 SCC 14.

adjustments and then you punch in the coordinates and the ticket that gets spit out often will say [conditional sentence order]. You crumple that up and throw it away and you just put your head in your hands.” Clearly, this judge was responding to the apparent conflict between individualized sentences and restrictions which reduced judicial discretion in terms of selecting the appropriate “tool” (sanction).

It is important to acknowledge circumvention and seek to understand its cause. After all, in the act of resistance, judges communicate. Not only can this tell us something about their understanding of the judicial role, but also, in a practical sense, what they believe they need to succeed in that role. Viewed this way, sentencing decisions are a form of “dialogue” and BC judges have been sending several (related) messages. The first is that the sentencing restrictions introduced by Bill C-10 are inconsistent with the principle of restraint in the use of imprisonment. As Pomerance noted, “in [place of conditional sentences] we see a return to real jail as the primary and, in many cases, the only sentencing alternative for many criminal offences.”⁶²⁰

Second, many see their roles as being, at least in part, protectors of society (and reducers of crime). And, to fulfill these roles, judges are saying that they require flexibility and the discretion to craft individualized responses. This includes having access to a variety of non-custodial options whose use can reduce the harms associated with traditional imprisonment (e.g., allow offenders to maintain employment, relationships, and ties to the community) and support offenders in their efforts to address mental health and substance abuse issues. Notably, as part of this effort, there is an identified need for appropriate resourcing so that offenders can be supported and supervised while serving community-based sentences.

Finally, judges want more (not fewer) tools in their sentencing toolbox. To that end, when dealing with an offence no longer eligible for conditional sentencing, some have taken to reconstructing suspended sentences by making them longer and stronger (more like conditional sentences). Amongst other things, this tells us that the judiciary has an interest in having (or creating) a non-custodial sanction that is less overtly punitive than prison, and that includes the elements of both a carrot and a stick. The proverbial carrot to offer suitable offenders the opportunity to remain in the community;

⁶²⁰ Pomerance, *supra* note 3 at p. 308.

the stick to discourage offending behaviour and non-compliance with conditions imposed. More importantly, perhaps, this sanction must include breach provisions that are timely, avoid the delays associated with new (breach) offences, and allow judges to effectively respond to (or manage) offender behaviour.

5.4 The future of conditional sentencing

This thesis has identified several factors that may have contributed to the lacklustre performance of conditional sentences as mechanisms for prison reduction. Notably, and perhaps somewhat predictably, the core challenge has been its inappropriate application to offenders not otherwise facing imprisonment. This, in turn, has been tied to the existing sentencing framework and the perpetuation of crime reduction as a goal of sentencing, a linkage that appears to have impacted the use of conditional sentences in at least two ways. First, its facilitated breach provisions appear to have unintentionally encouraged judges to use the sanction as a form of robust probation. Second, in the wake of restrictions that presumably would have resulted in the actual imprisonment of a great number of offenders, judges found ways around unduly harsh results that they believed were more likely to increase (not decrease) reoffending.

The restrictions imposed on the use of conditional sentences created tension in several ways. First, many judges saw the overall intention of Bill C-10 as being an overtly political effort to reduce their discretion, rather than a thoughtful package of reforms reflecting evidence-based policymaking. For some, this recognition delegitimized both the process and the outcome. Second, the restrictions introduced were inconsistent with jurisprudence that has repeatedly stressed the need for judicial discretion and deference towards sentencing judges. A regime that celebrates individualized sentencing seeks more, not less, flexibility and a greater range, not fewer tools.

Making such a broad swathe of offences ineligible for conditional sentencing increased the likelihood that judges would experience conflicts in terms of their ability to reconcile the suggested outcome (prison) with their personal sentencing ideologies and with the principles and purposes of sentencing. Consider, for instance, the dilemma faced by judges who believe that: 1) their role in sentencing is to protect society through the imposition of sanctions that will reduce the likelihood an offender will reoffend; 2) imprisoning an offender is always costly, often cruel, and likely to increase, not

decrease, future reoffending; and 3) community-based sentencing options are less costly, more compassionate, and more likely to achieve positive results (or, at the very least, to avoid negative results).

While some judges could reconcile the restrictions with their overarching obligation to apply laws duly passed, others sought creative approaches that would allow them to follow the letter of the law, if not its spirit. This project found that this included the use of suspended sentences reconstructed as disguised conditional sentence orders. This result is best understood in the context of section 718, which itself places an unrealistic burden on judges—the protection of society.⁶²¹ It establishes a crime control model that is not evidence-based and is arguably dishonest in terms of the relationship between sentencing and crime.⁶²² Sections 718.1 to 718.2 set out principles that are internally inconsistent and arguably unattainable. On the one hand, judges are directed to protect society, to impose proportionate sentences, to exercise restraint, to reduce crime, to deter, rehabilitate, and restore – on the other, their access to the tools that *they believe they need* to do so has, in many cases, been blocked.

The consensus view is that prison is cruel and costly, and its use as a crime reduction strategy counter-productive; this was and is the core rhetoric of conditional sentencing. Notably, the fact that conditional sentences have never accounted for a large proportion of outcomes does not mean that they were not valued by judges as a tool appropriate for specific types of offenders. Judges tell us this directly through their use of conditional sentences, and indirectly by finding ways to reconstruct them when they became unavailable for given offences. That was one of the messages delivered through this project.

⁶²¹ 718 - The fundamental purpose of sentencing is to protect society and to contribute, along with crime prevention initiatives, to respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions that have one or more of the following objectives:

(a) to denounce unlawful conduct and the harm done to victims or to the community that is caused by unlawful conduct;
(b) to deter the offender and other persons from committing offences;
(c) to separate offenders from society, where necessary;
(d) to assist in rehabilitating offenders;
(e) to provide reparations for harm done to victims or to the community; and
(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims or to the community.

⁶²² Doob, *supra* note 171 at p. 12.

Notably, of the judges who commented on the viability of conditional sentences going forward, most (14/22) suggested that the sanction should be maintained as is or expanded.⁶²³ The remaining eight judges supported an enforceable intermediate sanction in some form, though they were less certain that a conditional sentence is the best or only option. Judge C, for example, expressed an openness to considering amendments to the suspended sentence (in place of conditional sentences), explaining that “if changes are made to deal with the enforcement provisions for suspended sentences, then I don’t really think you need conditional sentences. In that sense [CSOs would] still be viable but unnecessary.”

Another suggestion that focused on reforming the suspended sentence (in place of the conditional sentence) came from Judge W, who explored the notion of developing a true suspended sentence, where the term would be announced but then suspended for a period in which the offender would be bound to comply with the conditions of a probation order. This judge argued that imposing a fixed term but then suspending its execution would do two things. First, it would encourage compliance with conditions because the results upon proven breach would be known in advance. Second, it would serve a public education function and likely be more acceptable to the public than available options.

The legal and academic literature offers additional perspectives in terms of conditional sentences moving forward. On the one hand, legal commentary has tended to frame both MMPs and conditional sentencing restrictions as problematic in terms of the principle of proportionality, the need to individualize sentences, and the unforeseen negative impacts on Indigenous and marginalized populations.⁶²⁴ Indeed, legislative reforms that reduce judicial discretion are often criticized as reflecting either a politicization of crime policy (populism) or a distrust of the judiciary that is generally rooted in concerns around perceived leniency. In its simplest form, restrictions on judicial

⁶²³ This is consistent with Stephens’ (2007) finding that, despite practical and ideological concerns, most of the judges she interviewed saw the conditional sentence as a “useful innovation” associated with a range of benefits. Stephens, *supra* note 161 at p. 45.

⁶²⁴ See, for instance, Parkes, *supra* note 314 ; Sylvestre, M.-E. (2013). The (Re) Discovery of the Proportionality Principle in Sentencing in Ipeelee: Constitutionalization and the Emergence of Collective Responsibility. *Supreme Court Law Review* (2d), 63, 461–481; Healy, *supra* note 315; Pomerance, *supra* note 3; Paciocco, *supra* note 486.

discretion are presented as negatives and their removal (or efforts to restore discretion) as positives.

Social scientists (criminologists), on the other hand, while generally agreeing with the potentially negative impacts of sentencing restrictions, have tended to offer more nuanced recommendations. Put another way, instead of defining restrictions as the problem and the removal of restrictions as the solution, some have chosen instead to explore the nature of the problem more fully. Notably, in doing so the issue can be re-defined as a lack of judicial and/or public support for the sanction. This broader understanding has resulted in calls to reconsider the restrictions, not in isolation but, rather, in conjunction with other reforms that are intended to address the challenges that gave rise to them in the first place.

Perhaps the most thoughtful amongst them are the proposals made by Reid and Roberts (2019), who call for a thorough parliamentary review of the conditional sentence and an exploration of the concept (and meaning) of net-widening.⁶²⁵ While supporting the removal of the restrictions placed on conditional sentences, the authors also offer several suggestions designed to increase judicial and public confidence in the sanction. These include “rebranding”, a greater investment in resources for community supervision, orders that carry greater “penal weight”, and lowering the ceiling on sentence length to remove more serious offences that may trigger media and public opposition.⁶²⁶

And so, the question that remains is clearly this—do we continue with piecemeal efforts to salvage a severely flawed option, or is it time to start over with conditional sentences? Like the sanction itself, the answer is complicated, as evidenced by the range of solutions advanced above. Regardless, we sit now at a crossroads. We can remain in the shallows, adopting a narrow view that focuses on either abandoning, restoring, or repairing the conditional sentencing provisions, or we can take this opportunity to go deeper—to undertake a broad review of sentencing practices, one that

⁶²⁵ Reid & Roberts, *supra* note 1 at p. 32. In terms of net-widening, the authors suggest that, in some cases, the concept should perhaps be understood not as the inappropriate application of a sanction but, rather, as “an understandable judicial reaction to an inadequately resourced community sanction” (at p. 35).

⁶²⁶ *Ibid* at pp 33-34.

would (at long last) allow for the development of comprehensive, coherent, and principled policies.

Conclusions

Limitations and future research

This study adds to the existing literature on restraint in the use of imprisonment by offering an explanation for the failure of conditional sentences as tools of prison reduction in BC, and by documenting the use of resistance strategies employed by judges in response to the restrictions imposed on their discretion by Bill C-10. In terms of the latter, judges have acted to protect core values, most notably of restraint, proportionality, and fairness. The findings from the current study are consistent with other research that has tied such efforts to the introduction of laws seen as being unfair or unduly harsh. Similar projects should be undertaken in other provinces/territories to determine the extent to which this is a national phenomenon.

The data relied upon in this investigation offered a new way of conceptualizing sentence decision-making, arguably one that is more relevant to judges and other practitioners. It did so by focusing on the primary sentence for each case (jail, conditional sentence, fine, suspended sentence, conditional or absolute discharge) and by treating probation more appropriately, as a secondary sanction. While the fact that a court sentencing database was created for the purposes of this study may raise concerns relating to data integrity and comparability, the fact that the findings consistently confirmed descriptions from official sources (e.g., predominantly summary offences, fewer and shorter conditional sentences after 2012, proportion of conditional sentences that included breach allegations, etc.) should provide readers with a high degree of confidence. Indeed, the primary limitation of this database would apply equally to existing official sources; that is, that it would have been helpful to have included offence dates, information regarding each offender's custody status, and possibly "flags" to indicate whether prison terms were to be served intermittently or as straight time.

The research design for this study was subject to both expected and unexpected limitations. In terms of the judicial survey, there was a relatively low response rate (25%). This was attributed in part to survey exhaustion and in part to an inability to employ best practices in conducting online surveys (e.g., sending out reminders). If the survey had been the only instrument used in collecting judicial "voices," the response rate might

have been more of a concern; instead, this limitation was mitigated by the unexpectedly high number of judges (24) who agreed to participate in the (much lengthier) interviews.

The decision to employ a semi-structured design in the interviews had both advantages and disadvantages. On the positive side, this provided some standardization, while at the same time allowing for the exploration of issues raised by the judges. This was an advantage as many interesting themes emerged which were not formally included in the original interview script. This also ended up being a limitation, given that there was a lack of consistency across interview transcripts, which resulted in too many topics with too few responses. This complicated efforts to quantify the analysis and discuss results.

Clearly, there is a need for further research that incorporates the voices of judges, whether collected through a survey, interviews, or focus groups. Given the growing practice of joint submissions on sentence, future efforts should similarly attempt to collect perspectives from prosecutors and defence counsel. This study has confirmed the importance of appropriate resourcing for community-based sentencing options; accordingly, correctional staff (probation officers) should be consulted on such issues to determine whether offenders are (or are not) being adequately supported and supervised in the community and, if not, to determine what is needed. Finally, in light of the focus (in BC) on rehabilitative objectives, future research should focus on sentence outcomes (recidivism) for offenders serving conditional sentences, and on establishing a process for providing such information to judges.⁶²⁷

The impact of Bill C-75 (2019) must be evaluated, both provincially and nationally. While framed as reforms aimed at reducing delay, the provisions relating to breaches of court orders and the increased hybridization of indictable offences have obvious implications for sentencing. Amongst other things, future research should examine the impact of this legislation on Crown decisions: 1) to charge administrative offences; and 2) to proceed summarily to increase the sentencing options available (and indirectly to increase their ability to negotiate plea deals). The first area is relevant to an assessment of decarcerative strategies writ large, the second to an improved

⁶²⁷ Several judges interviewed indicated they would be interested in receiving sentence outcome data as a form of feedback (positive or negative) regarding sentence choices in particular cases.

understanding of the role of prosecutorial discretion vis a vis the availability of conditional sentences.⁶²⁸

Similarly, the status of Bill C-22 should be monitored, particularly in terms of principled opposition that would seek more meaningful and fundamental change. Subject to an early enactment date, the decision in *Sharma* may still be both relevant and provocative as a research topic. Close attention should be paid to the Court's construction of social facts (e.g., conditional sentences as effective mechanisms for prison reduction) and handling of key issues. The respective roles of Parliament and the judiciary in establishing penal policy will be of particular interest, as will the Court's comments regarding the notions of community custody and sanction interchangeability, the latter in terms of suspended and conditional sentences.

It is appropriate that we strive for coherence and honesty in our sentencing provisions, and that we aspire, at all stages of the justice system, to exercise restraint in our use of imprisonment.⁶²⁹ In terms of crime reduction, however, we should prioritize efforts to keep people out of the system rather than looking for better ways to process them through it. As a quote generally attributed to Archbishop Desmond Tutu reminds us— “There comes a point where we need to stop just pulling people out of the river. We need to go upstream and find out why they're falling in.”

Where do we go from here?

This thesis began as a broad exploration of judicial perspectives on the use of conditional sentences in BC. The initial focus was on the impact of legislated restrictions that were placed on the use of this sanction in 2012 as a means of shedding light on the politicization of crime and the judicial response to this phenomenon. However, in the wake of two (2019) evaluations that suggested the sanction had largely failed in its primary purpose as a tool for meaningful prison reduction, the scope of the project

⁶²⁸ The second issue identified will be moot in the event the restrictions imposed on the use of the conditional sentence are removed (either through the court process or proposed legislation).

⁶²⁹ For many reasons, those interested in substantive reductions in the use of imprisonment in Canada should probably concentrate on offenders who are denied (or unable to perfect) bail prior to trial or disposition. While we may have once held the view that the sentence is properly the focus of criminal proceedings, it is increasingly apparent that decisions made at the bail stage are at least as important in terms of prison reduction.

expanded its observational lens. Adopting a broader focus encompassing the ‘life of conditional sentences’ thus far, this thesis identifies possible explanations for these empirical findings, with particular attention being paid to the role of the judiciary.

The relevance and timeliness of this broader research project increased with the release of *R. v. Sharma*—a 2020 decision of the Ontario Court of Appeal that has since gone to the Supreme Court of Canada.⁶³⁰ Given the government’s reluctance, up until this point, to reconsider the 2012 restrictions placed on conditional sentences, a decision by Canada’s top court would have been determinative of the fate of this criminal sanction. However, the federal Minister of Justice, perhaps anticipating the likely outcome of *Sharma* and wishing to be seen as progressively proactive rather than conservatively reactive, introduced a legislative package in early 2021 that, amongst other things, essentially removes the restrictions placed on conditional sentences by the previous (Conservative) government.⁶³¹ Like the proverbial cat, this criminal sanction may have yet another life to live. By extension, this latest twist in the on-going saga of the conditional sentence of imprisonment only increases the need—if not urgency—for a better understanding of its persistent failure to fulfil its principal objective of reducing Canada’s use of prison.

The narrative (so far) of conditional sentencing

Restraint in the use of imprisonment is (and has been) a long-standing and entrenched principle of Canadian penal policy. It was codified in 1996 by Bill C-41 and manifested in the creation, as part of the same legislative package, of the conditional sentence—a sanction that allows offenders to serve certain terms of imprisonment in the community. Yet, decades after their introduction, we are still searching for a place for this controversial sanction within Canada’s sentencing ‘toolbox,’ particularly as a mechanism for prison reduction. Conceptually and practically flawed from the beginning, conditional sentences were implemented notwithstanding identified concerns (e.g., net-widening, the need for resources, public support) and were introduced without meaningful

⁶³⁰ It is unclear what, if any, impact the introduction of Bill C-22 will have on the pending appeal at the Supreme Court of Canada. It is possible, for instance, that if the legislation passes quickly, the issue in *Sharma* (i.e., the constitutionality of restrictions on the use of conditional sentences that would no longer be in effect) may become moot.

⁶³¹ Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*. First reading February 18, 2021.

consultation or adequate planning. Indeed, to the extent that efforts were made to “sell” the new sanction at all, public statements and press releases reassured the public that conditional sentences were intended to be used only for less serious and non-violent offences.⁶³² Notably, the legislation contained no such restrictions and, in 2000, the Supreme Court of Canada confirmed that all offences that met the minimal requirements were eligible for conditional sentences (*Proulx*).

In retrospect, many judges saw the *Proulx* decision as a turning point in the sanction’s development. After all, the Court had provided a methodology, clarified its punitive nature, and resisted efforts to limit its application. Judges who went on to make genuine efforts to apply the lessons of *Proulx* to otherwise prison-bound offenders, however, soon realized that the responsibility for “selling” conditional sentences of *imprisonment* to the public had been left to them, and that the resources necessary for monitoring offenders in the community had not been provided. Perhaps not surprisingly, while overall rates of imprisonment in British Columbia declined somewhat following the Supreme Court decision, its potential effect was short-lived (see Appendix G). Indeed, levels of provincial incarceration began a steady climb as early as 2003, returning to pre-*Proulx* levels by 2007.

And so, *Proulx* arguably contributed to the downfall of the conditional sentence as a mechanism of restraint in the use of imprisonment in at least two ways. First, by allowing for its use with serious offences, this decision set the stage for backlash from a public that struggled to reconcile traditional notions of punishment and imprisonment with the sight of an offender walking out the front door of the courtroom at the end of the day. It should not be surprising that some judges became increasingly more sensitive to this displeasure. The decision’s second impact can be seen in rhetoric that explicitly granted equal status to the goals of prison reduction and crime reduction (e.g., through the pursuit of rehabilitative or restorative objectives). In doing so, the Court created a longer and stronger community-based option that some judges used as a form of robust probation. While an understandable response, a consequent increase in breaches would be expected.

⁶³² News Release, *supra* note 155.

The decade following *Proulx* can be characterized as one of growing tensions and conflicting values. The judiciary sought to expand judicial discretion through decisions that focused on individualization and deference, while Parliament responded with legislative restrictions aimed at reducing judicial discretion. Conditional sentences remained controversial and increasingly subject to criticism due to their non-sensical construction (as terms of imprisonment), an apparent lack of resources for offender supervision in the community, and a lack of public support, especially when used for serious or violent offences. For these reasons, and others, the sanction generally failed to attract any sizeable proportion of the caseload otherwise bound for prison. Particularly in BC, it appears that the appeal of a non-custodial option with facilitated breach provisions led to net-widening, largely defeating its purpose of decreasing the use of imprisonment. Equally notable, for those (fewer) cases in which judges genuinely attempted to achieve prison reduction, the application of conditional sentences to offenders convicted of serious offences (i.e., who otherwise would be prison-bound) attracted considerable negative media and public attention. Consequently, sentencing became a more overtly political issue, one that was seized upon by the Conservatives and ridden into power, initially as a minority government (2006)⁶³³ and later as a majority (2011).⁶³⁴

Upon gaining a Conservative majority in 2011, Parliament worked quickly to effectively limit the application of conditional sentences to summary offences (Bill C-10; 2012). This tough-on-crime legislation was challenged by many as being overtly political, inconsistent with the entrenched culture of restraint, not supported on any evidentiary basis, and not responsive to any identified problem. For some judges, the negative

⁶³³ For instance, in addition to a general 'tough-on-crime' approach to criminal justice policy, the 2006 Conservative Party platform included rhetoric directed specifically at conditional sentences (referred to as sentences of "house arrest"):

[A Conservative government] will ensure truth in sentencing and put an end to the Liberal revolving door justice system. The drug, gang, and gun-related crimes plaguing our communities must be met by clear mandatory minimum prison sentences and an end to sentences being served at home.

Conservative Party of Canada. (2006). *Stand up for Canada* (p. 46) [Federal Election Platform], at p. 22.

⁶³⁴ The 2011 Conservative Party platform was even more specific, promising that within 100 days of taking power, a Conservative majority government would pass legislation that would, amongst other things, "end house arrest" for "serious and violent criminals" and for "serious personal injury offences, such as sexual assault." Conservative Party of Canada (2011). *Here for Canada* (p. 67) [Federal Election Platform], at p. 50.

effects of incarceration, the politicization of the process, and their belief that Parliament had not thought through the rationale for (or impact of) the restrictions, became justifications to find ways to get around them. Assisted in this approach by the BC Court of Appeal decision in *Voong*, some judges applied the doctrine of exceptional circumstances to justify suspending sentence on charges for which conditional sentences were no longer available. In many cases this included efforts to reconstruct suspended sentences as a form of disguised conditional sentence (e.g., by making the orders longer, including onerous conditions, and re-framing the order using the Sword of Damocles metaphor). While judicial circumvention of the intent of the new law did not appreciably further the role of the conditional sentence in reducing Canada's reliance on prison, it would appear—at least in British Columbia—to have avoided the (expected) increase in rates of imprisonment.

The findings of this study suggest at least two possible explanations for the muted negative impacts of Bill C-10. The first is that most of the reforms that were expected to have the greatest punitive effects applied to indictable offences that were, relatively speaking, quite rare. The second possibility is much more provocative in that it suggests that judges have found ways around legislative requirements seen as being unduly harsh or unfair. In the context of the conditional sentencing restrictions, this has included suspending sentence and placing an offender on probation or using noticeably short jail terms (often with probation) in place of much lengthier conditional sentences

What the act of judicial resistance tells us

In the end, British Columbia emerges—in many respects—as a potential microcosm of trends in imprisonment rates at the national level. Both national and provincial jurisdictions have struggled in reducing the use of imprisonment (for adults) in any sustained or meaningful way. However, it is equally notable that Canadians—like residents of British Columbia—have also somehow resisted increasing the use of prison over the past four to five decades despite a barrage of tough-on-crime legislation (of which Bill C-10 is only one example) under the Harper administration. This 'feat' is all the more laudable considering the experience in other countries, most particularly the United States, in which imprisonment rates have increased substantially.

A more restricted focus on conditional sentencing, in particular, does not appear to alter the similarities between these two jurisdictions. Just as overall levels of imprisonment in British Columbia were largely unaffected by either the sanction's introduction in 1996, the Supreme Court of Canada's endorsement in 2000 (in *Proulx*), or the restrictions imposed by Bill C-10 (2012), Canada's imprisonment rates over this same period have remained generally stable. Notably, this stability has occurred notwithstanding reforms that have suggested shifts towards either restorative or punitive penal policy. Assuming that we can further extend these parallels between British Columbia and the wider country, it would seem that the judiciary has played an important role, particularly in the face of legislation that should have converted the vast majority of conditional sentences (on indictable offences) into prison terms. These legislative reforms should have resulted in a greater use of imprisonment. They did not.

The findings from this study suggest that the lack of impact is rooted largely in judicial intervention. While net-widening practices arguably restricted the ability to *reduce* imprisonment rates through the use of conditional sentences in place of prison during the pre Bill C-10 era, it was seemingly done in part as a necessary response to longstanding deficiencies in suspended sentences. While the failure to reduce the overall use of imprisonment is clearly a missed opportunity, judicial intervention in this form should have been largely anticipated and ultimately mitigated through (repeatedly called for) reform to the suspended sentence.

More importantly, judicial intervention during the post Bill C-10 era played a central role in avoiding an *increase* in imprisonment rates by largely circumventing the intent of the new legislation. With the removal of conditional sentences for a large portion of serious offences, judges have seemingly chosen in many cases to replace them with suspended sentences rather than imprisonment. One is strongly tempted to see the core of this judicial resistance as being firmly anchored in the principle of restraint and in its historical entrenchment as part of our national sentencing culture (see chapter 1). In perhaps classic or quintessential Canadian style, judges have arguably acted to maintain a level of balance and stability in what might otherwise have been a dramatic shift towards a more punitive, tough-on-crime sentencing culture. Notably, their ability to do so can be traced back to the fact that judges in Canada are somewhat insulated. In their analysis of this issue, for instance, Webster and Doob (2007, 2012) identify several so-called "protective factors" that relate specifically to judicial decision-making. These

include a commitment to the principle of judicial independence and an acknowledgement of the need to maintain some degree of judicial discretion (and deference).⁶³⁵

Canadian judges are appointed, not elected, and cannot be easily removed. For these (and other) reasons, they are notionally protected from both direct political pressure and swings in public opinion. This freedom, along with the flexibility generally inherent in sentence policy, has allowed judges to ensure more just outcomes in exceptional cases or to exert a stabilizing force in the use of imprisonment, when needed. Applied to the findings of this study, one could argue that by finding ways to resist (or circumvent) legislated restrictions that threatened long-held principles, BC judges were acting as guardians of Canada's core values, exercising restraint in the use of imprisonment and compassion in the handling of minority or marginalized populations.

The story that has yet to be written

After years of being criticized for not delivering substantive and progressive reform on criminal justice, Trudeau's Liberal government caught many off-guard with the recent introduction of Bill C-22.⁶³⁶ As drafted, the legislation would repeal 20 mandatory minimum penalties and vastly increase the availability of conditional sentences. The restrictions rooted in sections 742.1(e) and (f)⁶³⁷ would be repealed in their entirety, resolving the inconsistency that might have otherwise emerged had *Sharma* been upheld. If passed, the legislation would return the conditional sentencing provisions to their 2006 form (prior to Bills C-9 and C-10) with one exception—the broad ineligibility established by section 742.1(c) relating to offences prosecuted by indictment for which

⁶³⁵ Webster & Doob, *supra* note 108 at pp. 337-347; Webster, C. M., & Doob, A. N. (2012). Maintaining our balance: Trends in imprisonment policies in Canada. In K. Ismaili, J. B. Sprott, & K. Varma (Eds.), *Canadian Criminal Justice Policy: Contemporary Perspectives* (pp. 79–109). Oxford University Press, at pp. 92-93.

⁶³⁶ Bill C-22, *supra* note 631.

⁶³⁷ Section 742.1(e) currently makes a conditional sentence unavailable for any offence "prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that: (i) resulted in bodily harm, (ii) involved the import, export, trafficking or production of drugs, or (iii) involved the use of a weapon.

Section 742.1 (f) currently makes a conditional sentence unavailable for any offence "prosecuted by way of indictment, under any of the following provisions: [lists 11 specific offences, including sexual assault, motor vehicle theft, and theft over \$5,000]."

the maximum term of imprisonment is 14 years or life would be replaced with a narrower ineligibility that would apply only to attempted murder, torture, or advocating genocide.⁶³⁸

Notably, this legislation is not framed as having a general prison reduction goal but rather, as being responsive to the “systemic discrimination and disproportionate representation of Indigenous peoples, as well as Black Canadians and members of marginalized communities as offenders and victims in the criminal justice system.”⁶³⁹ While its introduction was largely welcomed by advocates for progressive penal policy, there was also a sense that Bill C-22 failed to go far enough.⁶⁴⁰ Perhaps ironically, one

⁶³⁸ Section 742.1 (d) would remain as is: “the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more.”

⁶³⁹ Department of Justice. (February 18, 2021). *News release: Government of Canada announces measures to keep communities safe, fight systemic racism and make our criminal justice system more effective for all*. Government of Canada.

Specifically, the legislation is framed as being responsive to the *Truth and Reconciliation Commission*, the *National Inquiry into Missing and Murdered Indigenous Women and Girls*, and the 2020 Statement of the *Parliamentary Black Caucus*. See statement released by The Honourable Kim Pate, C.M., Senator for Ontario – Statement: Bill C-22 Aims to do Justice for Some, Not All (February 18, 2021).

⁶⁴⁰ Critics of the Bill C-10 restrictions welcomed their loosening while, at the same time, often expressing the view that the Bill C-22 reforms do not go far enough in terms of eliminating MMPs. See, for instance, Rudnicki, Chris [@chrisrudnicki]. (2021, February 18). *This is a really big deal. Parliament is breathing new life into the conditional sentence regime. This is going to change a lot of lives*. [Tweet]. Twitter. <https://twitter.com/chrisrudnicki/status/1362478475450462214>; Kerr, Lisa [@coleenlisa]. (2021, February 18). *I am very excited indeed to stop complaining that the Liberals did not try to fix any of the Conservative-era sentencing policies. These are very welcome reforms that will make a real difference in people's lives*. [Tweet]. Twitter. <https://twitter.com/coleenlisa/status/1362476536604086281>; Sankoff, Peter [@petersankoff]. (2021, February 18). *You can argue that this is the best development in sentencing since conditional sentences were first enacted. The ridiculous restrictions on them gutted their utility*. [Tweet]. Twitter. <https://twitter.com/petersankoff/status/1362488030804680705>; Parkes, Debra [@DebraParkes]. (2021, February 18). [Y]es...more people will get conditional sentences (house arrest) but we desperately need progressive folks to challenge the false dichotomy between “violent” and “non-violent” offences. [Tweet]. Twitter. <https://twitter.com/DebraParkes/status/1362517266215014403>; Pate, Kim [@KPateontheHill]. (2021, February 23). *9 in 10 [Canadians] want judges to have authority to not impose MMPs. Bill C-22 repeals a mere 19 of 43 MMPs that have already been struck down by courts at all levels*. [Tweet]. Twitter. <https://twitter.com/KPateontheHill/status/1364226845827244038>.

Notably, some also expressed concern regarding the potential impact of lifting the conditional sentencing restrictions. See, for instance, Walia, Harsha [@HarshaWalia]. (2021, February 18). *However, conditional sentences can quickly become a de facto pipeline to incarceration, especially when punitive conditions such as house arrest, curfews or mandatory counselling are breached*. [Tweet]. Twitter. <https://twitter.com/HarshaWalia/status/1362465494943473671>.

of the most vocal critics has been the former Minister of Justice, under whose watch—and despite multiple calls—no changes to the conditional sentence were proposed.⁶⁴¹

An argument could be made that, at best, Bill C-22 represents a naïve and superficial effort to address two complex and deeply rooted fundamental challenges—systemic racism and principled penal policy. While intersecting with the disproportionate incarceration of Indigenous and marginalized populations, the two issues are also distinct. The first draws attention to economic, social, and structural inequalities and systemic racism; the second to the need for rational, realistic, and principled penal policy. As Parliament is well aware, neither of these important issues lends itself to one-dimensional “quick fixes”. And so, at worst, Bill C-22 reflects a deliberate effort to create the illusion of reform, possibly to pacify movements calling for more radical (or thoughtful) change.

The stated intention of Bill C-22 is the removal of many of the sentencing restrictions imposed by the previous (Conservative) government. That it proposes to do so without acknowledging (or addressing) the challenges that created the environment within which they were spawned in the first place, is problematic. Indeed, the principal concern raised in the context of the Supreme Court of Canada endorsing the decision in *Sharma* (see 5.2.1) would apply. That is, in the absence of reforms designed to address the many flaws of conditional sentencing, there is little reason to expect that there would be a different outcome. In other words, if we do not deal with the longstanding problems (e.g., construction, resourcing, public support/education), we will simply be repeating the same mistake—and likely getting the same result.

A glimmer of hope?

If there is reason to hope that we might see more meaningful reforms this time, it resides in the consensus developing around the need for (and possibility of) normative change. Notably, many sentencing experts have drawn attention to the importance of the symbolic element of sentencing and its role as the expression of shared societal values. Indeed, while acknowledging that it may be possible to reduce the use of imprisonment

⁶⁴¹ See Wilson-Raybould, J., Pate, K., & Thomas Bernard, Wanda. (2021, February 23). Bill C-22 is inadequate for the task of addressing injustice in Canada’s justice system. *Globe and Mail*. <https://www.theglobeandmail.com/opinion/article-bill-c-22-is-inadequate-for-the-task-of-addressing-injustice-in/>.

in other ways (e.g., by legislatively restricting the availability of custodial options), such reforms may not be well received by the public within the current punitive sentencing culture, especially if applied to serious and/or violent offences. For that reason, and others, several academics have suggested that lasting reform would require normative shifts in terms of how we collectively think about the need for punishment and the use of incarceration.⁶⁴² In the context of conditional sentences, that could mean that instead of trying to convince the public that the sanction fits within a punitive paradigm (e.g., by making them longer and stronger, tightly monitored, and vigorously enforced), we change the paradigm.

With that lens in place, there may be room for cautious optimism on two fronts. One relates to the public's readiness for (or openness to) further sentencing reform, as reflected in recent national public surveys conducted by the Department of Justice.⁶⁴³ The other, and perhaps more critical element in terms of normative change, has arguably emerged from the dialogue initiated by the social and racial justice movements that have grown partially out of concerns regarding systemic racism within both the American and Canadian criminal justice systems. Each of these influences will be briefly explored.

In 2016 and 2017, the Department of Justice undertook a study designed to provide information regarding Canadians' perceptions and priorities on justice-related issues.⁶⁴⁴ Despite the fact that the study pre-dated the social and racial justice movements that gained prominence in 2020, several findings are notable. First, respondents generally endorsed the principle of restraint, agreeing that incarceration should be reserved for offenders convicted of serious crimes (63%).⁶⁴⁵ There was also considerable support for the use of non-custodial sentences (e.g., conditional sentences

⁶⁴² See, for instance, Doob & Webster, *supra* note 552; Tonry, *supra* note 552; Klingele, *supra* note 604.

⁶⁴³ Department of Justice, *supra* notes 110 and 111.

⁶⁴⁴ This included a large-scale survey (n=4,200), a follow-up survey (n=1,863), a series of in-person focus groups, and a three-day online discussion that sought to clarify findings (n=25). Given that participants volunteered to be part of these studies, however, the responses cannot be considered to be representative of all Canadians. Department of Justice, *supra* note 111 at pp. i.

⁶⁴⁵ Department of Justice, *supra* note 110 at p. 54.

and probation⁶⁴⁶), especially in cases involving non-violent offences (56% very and 37% moderately supportive). In a related finding, 88% of respondents endorsed problem solving approaches to criminal justice that aimed at dealing with the root causes of crime and conflict. This included 58% that believed such methods should be promoted and an additional 30% who expressed moderate support for this position.⁶⁴⁷

Respondents expressed concern that mandatory minimum penalties could lead to unfair or inappropriate sentences and fully 8 out of 10 (81%) believed judges should have the flexibility to consider an offender's personal circumstances (e.g., mental or health issues).⁶⁴⁸ Notably, when presented with options that represented varying degrees of discretion, most (71%) participants believed that judges should have discretion on sentencing, but that this discretion should be limited by predetermined guidelines. Indeed, there was strong support for the introduction of sentencing guidelines (81%) and only slightly less backing for the creation of an independent sentencing commission (69%) in Canada.⁶⁴⁹ These findings are relevant to modern-day reforms in that they suggest that recent efforts to simply reverse the damage done by Harper's Conservatives (e.g., Bill C-22) may represent a critical missed opportunity—that is, to engage in a thoughtful analysis of the purposes and principles of sentencing going forward.

It is perhaps serendipitous that public support for principled law reform in Canada has been met with an energizing racial and social justice movement, but that is where we are. The videotaped police killing of George Floyd in 2020 triggered a summer of protests and a national reckoning on racial injustice in America. In the midst of a pandemic, Canadians marched as well, drawing attention to systemic discrimination and

⁶⁴⁶ As suggested earlier, it would have been preferable to know what actual outcomes were captured under the heading of “probation”. Presumably, this ‘category’ was intended to reflect cases in which the most serious sentence was probation (i.e., where the primary sentence was a suspended sentence, conditional discharge, or fine). Given that the focus of the research was on public attitudes, it makes sense to use the generic (or generally understood) meaning of that term.

⁶⁴⁷ *Ibid* at p. 34.

⁶⁴⁸ Department of Justice, *supra* note 111 at p. 29.

⁶⁴⁹ Department of Justice, *supra* note 110 at p. 24. In terms of activities for an independent sentencing commission, the top four were identified as: providing judges with guidelines (73%), conducting research aimed at identifying effective sentencing practices (65%), making recommendations regarding sentencing reforms to the federal government (60%), and providing information to crime victims and members of the public regarding practices and research (59%).

the disproportionate representation of minorities and marginalized populations in our criminal justice and prison systems. The public, through the media, was saturated with heart-wrenching tales of systemic abuse that elevated the reports of the Truth and Reconciliation Commission and the National Inquiry into Missing and Murdered Indigenous Women and Girls. As a result, much of the focus in Canada has been on racism impacting primarily Indigenous offenders, though this has been recently broadened to capture other minority groups as well (e.g., Black offenders).⁶⁵⁰

In a disappointing but perhaps unsurprising move, instead of taking advantage of the opportunity for a system-wide review of processes and policies, the government appears to have chosen the relatively quick political win. In the same way that Bill C-10 and the tough-on-crime agenda was criticized for responding to populist cries for increased punishment, Bill C-22 could be similarly framed, as a political response to calls to decrease racial inequities. While many would argue that the removal of sentencing restrictions is an inherently positive move, it is risky for two reasons. First, assuming there has been no change in the “hearts and minds” of the Canadian public, we will have learned nothing and fixed nothing. To the extent that judges use their (returned) discretion to impose conditional sentences in cases seen to “require imprisonment,” we should expect to see (again) calls for the sanction’s restriction or abolition. Second, assuming there has been a normative change in the way in which Canadians think about punishment and/or jail, we will have taken a small step along the path of ad hoc amendments, instead of taking advantage of circumstances that might have allowed us to, at long last, adopt a comprehensive, coherent, principled, and rational approach to criminal justice policy development.⁶⁵¹

In a very real sense, the policy issues raised in the context of conditional sentencing and the debate regarding their role and application bring us full circle, back to the Canadian Sentencing Commission and the (unresolved) challenges that it identified

⁶⁵⁰ For instance, in February of 2021 the Ontario Court of Appeal heard arguments in the case of *R. v. Morris* (C65766). At issue is the question of how courts should take systemic and background factors into account when sentencing Black offenders. Lower court decision: *R. v. Morris*, 2018 ONSC 5186.

⁶⁵¹ Ideally such a review would be undertaken by a sentencing commission established for that purpose. At the very least, government should initiate an evidence-based analysis of the efficacy of sentences designed to deter and/or rehabilitate offenders. Legislation should not promote sentencing as a crime control strategy in the absence of consistent and compelling evidence supporting meaningful reductions in recidivism as a result of sentences imposed.

in 1987. These included: an absence of policy (clarity) from Parliament in terms of guiding principles; appellate courts that are ill equipped to provide guidance to judges; a lack of systematic information about sentencing practices; a lack of public confidence in sentencing; unwarranted disparity (inconsistency and inequity) in sentences; and an over-reliance on imprisonment.⁶⁵²

Recent scholarly “thought pieces” offer a variety of perspectives on what is needed and how we might go about reforming sections 718 through 718.2, ideally under the umbrella of an independent sentencing commission.⁶⁵³ These discussion papers should form part of a larger national dialogue that incorporates views from a variety of stakeholders, including, amongst others: the judiciary, prosecution services, the defence bar, provincial correctional agencies, victim advocacy groups, and representatives from Indigenous communities. In addition to revisioning the purposes and principles of sentencing, the rationale for, and jurisdiction of, specialized or problem-solving courts should be clarified.

The nature and function of conditional and suspended sentences should be fully considered before amendments to either are introduced. The experience in BC has contributed to the blurring of boundaries between the two community-based options, raising the question of whether both sanctions are necessary. Regardless, the discouraging (2019) evaluations of the conditional sentence suggest that it has not been wholly successful as a mechanism of prison reduction, at least in part due to its inappropriate application to offenders not otherwise bound for prison. From a policy point of view, the ramifications of these results must be carefully considered. At the very least, we should be clear on whether the restrictions are being removed because of, or despite, the sanction’s apparent failure in achieving its principal objective.

⁶⁵² CSC, *supra* note 38 at p. xxii.

⁶⁵³ Doob, *supra* note 171; see also Berger, B. L. (2016). *Reform of the purposes and principles of sentencing: A think piece* (p. 15). Research and Statistics Division; Department of Justice Canada; Dunning, L. (2016). *An opinion on reform changes with respect to the principles and purposes of sentencing* (p. 13). Research and Statistics Division; Department of Justice Canada; Ferguson, G. (2016). *A review of the principles and purposes of sentencing in sections 718-718.2 of the Criminal Code* (p. 24). Research and Statistics Division; Department of Justice Canada; Sylvestre, M.-E. (2016). *“Moving towards a minimalist and transformative criminal justice system”: Essay on the reform of the objectives and principles of sentencing*. Research and Statistics Division; Department of Justice Canada.

We can continue with a politicized and piecemeal approach to sentencing policy, or we can do the hard work required to establish an internally consistent, realistic, and evidence-based approach in this critical area. At the end of the day, we return to Doob's (1990) evergreen caution that hopes and prayers are not enough. If we want to elevate the principle of restraint (i.e., reduce the use of imprisonment), we need both a Parliamentary endorsement of community sanctions and some way of providing sentencing judges with the authoritative and unambiguous guidance that they need.⁶⁵⁴ Indeed, now is the time for such a reset in sentencing policy, one that addresses the problems manifest in our modern criminal justice system based on evidence, not politics. We must aspire to having an informed public, an engaged judiciary, and a government willing to make difficult decisions. At the very least, we should have a permanent and independent sentencing commission. That, more than anything, would be a promising first step.

And finally, as we find ourselves (once again) at a crossroads with regards to the place of conditional sentences within our sentencing arsenal, we must remember that we are not likely to resolve the challenges of this criminal sanction by applying the same thinking that created them. Otherwise, history will almost assuredly repeat itself. Just as importantly though, we are past the point of tinkering. A genuine interest in salvaging a sanction capable of acting as a prison alternative will likely require a complete re-set, and we may (finally) be in a position to bring this task into fruition. At that point, history can plot a new course. To paraphrase C.S. Lewis, while we cannot go back and change the beginning, we can still change the ending.

⁶⁵⁴ Doob, *supra* note 2 at p. 415.

References

- Aasen, J. (1985). *Enforcement of probation in British Columbia* (MA Thesis). Simon Fraser University.
- Adams, M. (2003). *Fire and Ice: The United States, Canada, and the myth of converging values*. Penguin Canada.
- Adams, M. (2014). The Harper government has made a tough stance on crime one of its showcase positions. Why? *Policy Options*.
<https://policyoptions.irpp.org/magazines/beautiful-data/adams/>
- Alberta Justice and Attorney General. (2003). *The conditional sentence of imprisonment: The need for amendment*. (Paper submitted to Standing Committee on Justice and Human Rights).
- Andrews, D. A., Zinger, I., Hoge, R. D., Bonta, J., Gendreau, P., & Cullen, F. T. (1990). Does correctional treatment work? A clinically relevant and psychologically informed meta-Analysis. *Criminology*, 28(3), 369–404.
- Austin, I. (2000, April 25). Send 'em to jail, say B.C. and Ontario. *Vancouver Province*, A12.
- Beattie, K. (2006). *Adult Correctional Services in Canada, 2004/2005* (Juristat: Canadian Centre for Justice Statistics). Statistics Canada.
- Bellett, G. (2000, August 29). House arrest monitored only 9-5, prosecutor says. *Vancouver Sun*, B4.
- Benedet, J. (2019). Sentencing for sexual offences against children and youth: Mandatory minimums, proportionality and unintended consequences. *Queen's Law Journal*, 44(Spring), 284.
- Berger, B. L. (2016). *Reform of the purposes and principles of sentencing: A think piece*. Research and Statistics Division; Department of Justice Canada.
- Bersani, B. E., Nieuwbeerta, P., & Laub, J. H. (2009). Predicting trajectories of offending over the life course: Findings from a Dutch conviction cohort. *Journal of Research in Crime & Delinquency*, 46(4), 468–494.
- Bill C-9, *An Act to amend the Criminal Code (Conditional Sentence of Imprisonment)*. S.C. 2007, c.12.

Bill C-10, *An Act to enact the Justice for Victims of Terrorism Act and to amend the State Immunity Act, the Criminal Code, the Controlled Drugs and Substances Act, the Corrections and Conditional Release Act, the Youth Criminal Justice Act, the Immigration and Refugee Protection Act and other Acts* (Short title: *Safe Streets and Communities Act*). S.C. 2012, c.1.

Bill C-16, *An Act to amend the Criminal Code (Ending House Arrest for Property and Other Serious Crimes by Serious and Violent Offenders Act)* (Canada, 40th Parl., 3rd Sess. 2010).

Bill C-19. First reading February 7, 1984, in the 2nd session, 32nd Parliament.

Bill C-22, *An Act to amend the Criminal Code and the Controlled Drugs and Substances Act*. First reading February 18, 2021.

Bill C-25, *An Act to amend the Criminal Code (Limiting Credit for Time Spent in Pre-sentencing Custody)*, 40th Parl., 2nd Sess., 2009. Proclaimed into force on February 22, 2010. (Short title: *Truth in Sentencing Act*). S.C. 2009, c.29.

Bill C-41, *An Act to amend the Criminal Code (Sentencing) and other Acts in consequence thereof*. 35th Parl., 1st Sess. S.C. 1995, c 22.

Bill C-42, *An Act to amend the Criminal Code (Ending Conditional Sentences for Property and Other Serious Crimes Act)* 40th Parl., 2nd Sess. 2009).

Bill C-51 – *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, S.C. 2018, c.29.

Bill C-70, *An Act to amend the Criminal Code (Conditional Sentence of Imprisonment)*. First reading October 27, 2005. 38th Parl., 1st Sess.

Bill C-75, *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, S.C. 2019, c 25.

Bill C-90, *An Act to Amend the Criminal Code (Sentencing)*. First Reading June 23, 1992, 34th Parl., 3rd Sess.

Bill S-208, *An Act to amend the Criminal Code (Independence of the Judiciary)*. First reading in the Senate February 2, 2020.

Blanchfield, M. (2000, February 1). Violent offenders eligible for conditional sentences. *National Post*, A4.

Bottoms, A. E. (1981). The suspended sentence in England, 1967-1978. *The British Journal of Criminology*, 21(1), 1–26.

Bottoms, A. E. (2017). "Punishment" in non-custodial sentences: A critical analysis. *Criminal Law Forum*, 28(3), 563–587.

- Bouffard, J. A., MacKenzie, D. L., & Hickman, L. J. (2000). Effectiveness of vocational educational and employment programs for adult offenders: A methodology-based analysis of the literature. *Journal of Offender Rehabilitation*, 31, 1–41.
- Brodeur, J.-P. (1999). Sentencing reform: Ten years after the Canadian Sentencing Commission. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (332–348). University of Toronto Press.
- Cairns Way, R. (2015). A Disappointing Silence: Mandatory Minimums and Substantive Equality. *Criminal Reports*, 18(7th), 297.
- Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.
- Canadian Press. (2000a, February 17). Man convicted in fatal shooting of his pal won't serve any time in jail. *Vancouver Sun*, A13.
- Canadian Press. (2000b, December 10). Repeat sex offender's victim angry at community sentence. *Vancouver Province*, A36.
- Canadian Sentencing Commission. (1987). *Sentencing reform: A Canadian approach: Report of the Canadian Sentencing Commission*. J.R. Omer Archambault, Chair. Minister of Supply and Services Canada.
- Cecil, D. K., Drapkin, D. A., MacKenzie, D. L., & Hickman, L. J. (2000). The effectiveness of adult basic education and life-skills programs in reducing recidivism: A review and assessment of the research. *Journal of Correctional Education*, 51, 207–226.
- Clark, G. (2000, June 7). No jail for driver who killed two. *Vancouver Province*, A12.
- Cohen, S. (1985). *Visions of social control: Crime, punishment, and classification*. Cambridge (Cambridgeshire: Polity press).
- Conservative Party of Canada. (2006). *Stand up for Canada* (Federal Election Platform).
- Conservative Party of Canada. (2011). *Here for Canada* (Federal Election Platform).
- Craig, Wallace, "Conditional sentences are judicial cop-outs", North Shore News, October 20, 2004.
- Daubney, D., & Parry, G. (1999). An Overview of Bill C-41 (The Sentencing Reform Act). In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (31–47). University of Toronto Press.
- Dawson, F. (2000, June 23). Put this thug away, frustrated cop pleads in letter to Crown. *Vancouver Province*, A3.

- Department of Justice. (1996). *News release: Chapter 22 of the Statutes of Canada (formerly Bill C-41)*. Government of Canada.
- Department of Justice. (2012). *News release (The Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada)*. Government of Canada.
- Department of Justice. (2017). *National Justice Survey: Canada's Criminal Justice System* (p. 169) (Synthesis report). Department of Justice Canada.
- Department of Justice. (2018). *National Justice Survey 2017: Issues in Canada's Criminal Justice System* (p. 116) (Summary report). Department of Justice.
- Department of Justice. (2021). *News release: Government of Canada announces measures to keep communities safe, fight systemic racism and make our criminal justice system more effective for all*. Government of Canada.
- Department of Justice, Sentencing Team, Policy Programs and Research Sector. (1991). *Intermediate Sanctions "Consultation letter."*
- Deshman, A., & Myers, N. (2014). *Set up to fail: Bail and the revolving door of pre-trial detention* (p. 117). Canadian Civil Liberties Association and Education Trust.
- Doob, A. N. (1990). Community sanctions and imprisonment: Hoping for a miracle but not bothering even to pray for it. *Canadian Journal of Criminology*, 32(3), 415–428.
- Doob, A. N. (1995). The United States Sentencing Commission guidelines: If you don't know where you are going, you might not get there. In C. Clarkson & R. Morgan (Eds.), *The Politics of Sentencing Reform* (199–250). Clarendon Press.
- Doob, A. N. (1999). Sentencing reform: Where are we now? In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (349–363). University of Toronto Press.
- Doob, A. N. (2000). Transforming the punishment environment: Understanding public views of what should be accomplished at sentencing. *Canadian Journal of Criminology*, 42(3), 323–340.
- Doob, A. N. (2011). The Unfinished Work of the Canadian Sentencing Commission. *Canadian Journal of Criminology and Criminal Justice*, 53(3), 279–297.
- Doob, A. N. (2016). *A values and evidence approach to sentencing purposes and principles*. Research and Statistics Division; Department of Justice Canada.
- Doob, A. N., & Marinos, V. (1995). Reconceptualizing punishment: Understanding the limitations on the use of intermediate punishments. *University of Chicago Law School Roundtable*, 2(2), 413–433.

- Doob, A. N., & Webster, C. M. (2003). "Sentence severity and crime: Accepting the null hypothesis." In M. Tonry (Ed.), *Crime and Justice: A review of research* (Vol. 30, 143–195). University of Chicago Press.
- Doob, A. N., & Webster, C. M. (2006). Countering Punitiveness: Understanding Stability in Canada's Imprisonment Rate. *Law & Society Review*, 40(2), 325–368.
- Doob, A. N., & Webster, C. M. (2013). The "Truth in Sentencing", Act: The Triumph of Form over Substance. *Canadian Criminal Law Review*, 17(3), 365–392.
- Doob, A. N., & Webster, C. M. (2014). Creating the will to change: The challenges of decarceration in the United States. *Criminology & Public Policy*, 13, 547–559.
- Doob, A. N., & Webster, C. M. (2015a). The Harper revolution in criminal justice policy...and what comes next. *Policy Options*, 36(May), 24–31.
- Doob, A. N., & Webster, C. M. (2016). Weathering the Storm? Testing Long-Standing Canadian Sentencing Policy in the Twenty-First Century. *Crime & Justice*, 45(1), 359–418.
- Doob, A. N., & Webster, C. M. (2020). The real divide: When Alberta's criminal justice policy is more progressive than that of the Trudeau government. *Justice Report*, 35(2).
- Doob, & Webster, C. M. (2015b). The promise ahead: Using the past to guide reforms of Canada's criminal justice system. *Justice Report*, 30(4), 6–9.
- Dugan, L., Nagin, D. S., & Rosenfeld, R. (2003). Exposure reduction or retaliation? The effects of domestic violence resources on intimate-partner homicide. *Law & Society Review*, 37, 169–198.
- Dunning, L. (2016). *An opinion on reform changes with respect to the principles and purposes of sentencing* (p. 13). Research and Statistics Division; Department of Justice Canada.
- Easton, S., & Piper, C. (2012). *Sentencing and punishment: The quest for justice* (Third). Oxford University Press.
- Edgar, A. (1999). Sentencing options in Canada. In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (112–136). University of Toronto Press.
- Edgar, A., & Roberts, J. (2006). *Victim Impact Statements at Sentencing: Judicial experiences and perceptions* (p. 51). Canada Department of Justice.
- Editorial. (2000, February 1). Conditional justice. *National Post*, A19.
- Editorial. (2006, May 9). Harper's plan for a safer Canada. *National Post*, A16.

- Emmanuel, N., & Gazal-Ayal, O. (2019). Suspended sentences and service labor in Israel—From alternatives to imprisonment to net-widening. *Law and Contemporary Problems*, 82(1), 111–136.
- Ericson, R. (1987). The state and criminal justice reform (Ch 2). In Ratner & McMullen (Eds.), *State control*. UBC Press.
- Feeley, M. M., & Simon, J. (1992). The new penology: Notes on the emerging strategy of corrections and its implications. *Criminology*, 30(4), 449–474.
- Ferguson, G. (2016). *A review of the principles and purposes of sentencing in sections 718-718.2 of the Criminal Code* (p. 24). Research and Statistics Division; Department of Justice Canada.
- Finn, P. (1998). Job Placement for Offenders in Relation to Recidivism. *Journal of Offender Rehabilitation*, 28(1/2):89-106.
- Fleischhaker, C. L. (2000). The breach provisions of the conditional sentence a.k.a. “Expeditious Justice.” *Criminal Law Quarterly*, 43, 305.
- Frase, R. S. (2019). Suspended sentences and free-standing probation orders in U.S. guidelines systems: A survey and assessment. *Law and Contemporary Problems*, 82(1), 51–80.
- Freiberg, A. (2019). Suspended sentences in Australia: Uncertain, unstable, unpopular, and unnecessary? *Law and Contemporary Problems*, 82(1), 81–110.
- Furguson, D. (2000, September 3). Breaches of house arrest “very high.” *Tri-City News*, 13.
- Gazal-Ayal, O. (Ed.). (2019). Alternatives to imprisonment (Special issue). *Law and Contemporary Problems*, 82(1).
- Gazal-Ayal, O., & Roberts, J. V. (2019). Alternatives to imprisonment: Recent international developments (Foreword). *Law and Contemporary Problems*, 82, i–ix.
- Gemmell, J. (1997). The new conditional sentencing regime. *Criminal Law Quarterly*, 39, 334–361.
- Gemmell, J. (1999). Conditional sentences. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (63–76). University of Toronto Press.
- Government of Canada. (1984). *Sentencing* (p. 72). Minister of Justice and Attorney General of Canada.
- Government of Canada. (1990a). *Directions for reform: A framework for sentencing, corrections and conditional release* (p. 32). Solicitor General of Canada.

- Government of Canada. (1990b). *Directions for reform: Corrections & conditional release*. Solicitor General of Canada.
- Government of Canada. (1990c). *Directions for reform: Sentencing*. Solicitor General of Canada.
- Government of Canada. (1993). *Crime prevention in Canada: Toward a national strategy* (12th Report). Standing Committee on Justice and the Solicitor General (3rd session, 34th Parliament).
- Griffiths, N. (2020, December 27). Drug possession charges vary by force. *The Province*, 6.
- Gutierrez, L., & Chadwick, N. (2020). Are conditional sentence orders used differently for Indigenous offenders? A comparison of sentences and outcomes in Canada. *Canadian Journal of Criminology & Criminal Justice*, 62(4), 1–29.
- Healy, P. (1999). Questions and answers on conditional sentencing in the Supreme Court of Canada. *Criminal Law Quarterly*, 42(May), 12–37.
- Healy, P. (2013). Sentencing from There to Here and from Then to Now. *Canadian Criminal Law Review*, 17(3), 291–304.
- House of Commons, C. (1988). *Taking Responsibility. Report of the Standing Committee on Justice and Solicitor General on its review of sentencing, conditional release and related aspects of corrections*. David Daubney, Chair. Queen's Printer for Canada.
- Jackson, M. (1988). *A profile of Canadian alternative sentencing programmes: A national review of policy issues* (p. 252). Department of Justice Canada.
- Jull, K. (1999). Reserving rooms in jail: A principled approach. *Criminal Law Quarterly*, 42(1), 67–115.
- Kerr, Lisa [@coleenlisa]. (2021, February 18). *I am very excited indeed to stop complaining that the Liberals did not try to fix* [Tweet]. Twitter. <https://twitter.com/coleenlisa/status/1362476536604086281>
- Kerans, Roger, "Go to your room!" The Globe and Mail, February 3, 2000.
- Kinney, J. B. (2005). *Court sentencing patterns* (PhD thesis) Simon Fraser University.
- Klingeale, C. (2013). Rethinking the use of community supervision. *Journal of Criminal Law & Criminology*, 103(4), 1015–1069.
- Klingeale, C. (2016). The promises and perils of evidence-based corrections. *Notre Dame Law Review*, 91(2), 537–584.

- La Prairie, C. (1999a). *Conditional sentence orders by province and territory—Final Report (September 6, 1996—September 30, 1999)*. Department of Justice Canada.
- La Prairie, C. (1999b). Some reflections on new criminal justice policies in Canada: Restorative justice, alternative measures and conditional sentences. *Australian and New Zealand Journal of Criminology*, 32(2), 139–152.
- La Prairie, C., & Koegl, C. (1998). *Conditional sentencing: Exploratory research into opinions and perceptions of judges in select urban courts* (p. 13). Department of Justice Canada.
- Lau, R. R., & Schlesinger, M. (2005). Policy frames, metaphorical reasoning, and support for public policies. *Political Psychology*, 26(1), 77–114.
- Law, M. A. (2016). *The federal victim surcharge: The 2013 amendments and their implications in nine jurisdictions (Final Report)* (p. 46). Minister of Justice and Attorney General of Canada.
- Law Reform Commission of Canada. (1976). *Our criminal law / Law Reform Commission of Canada*. Ottawa: Law Reform Commission of Canada.
- Lulham, R., Weatherburn, D., and Bartels, L. (2009). The recidivism of offenders given suspended sentences: A comparison with full-time imprisonment. *Crime and Justice Bulletin*, 136.
- MacAlister, D., & Barkase, K. (2018). Mandatory minimum sentencing for drug offences in Canada. *Criminal Law Quarterly*, 66, 161–194.
- MacGuigan Report. (1977). *Report to Parliament by the Sub-Committee on the Penitentiary System in Canada*. Minister of Supply and Services Canada.
- Malakieh, J. (2019). *Adult and youth correctional statistics in Canada, 2017/2018* (Juristat: Canadian Centre for Justice Statistics No. 85-002-X; p. 26). Statistics Canada.
- Mallea, P. (2010). *The fear factor: Stephen Harper's "Touch on crime" agenda* (p. 58). Canadian Centre for Policy Alternatives (CCPA).
- Manfredi, C. P. (2005). Deja Vu all over again: Chaoulli and the limits of judicial policymaking. In C. M. Flood, K. Roach, & L. Sossin (Eds.), *Access to care, access to justice: The legal debate over private health insurance in Canada* (139–157). University of Toronto Press.
- Manson, A. (1997a). Finding a place for conditional sentences. *Criminal Reports (5th)*, 3, 283–300.

- Manson, A. (1997b). The appeal of conditional sentences of imprisonment. *Criminal Reports (5th)*, 5, 279–290.
- Manson, A. (1997c). Canada's new conditional sentence: Will it replace incarceration or probation? *Federal Sentencing Reporter*, 9(5), 250–255.
- Manson, A. (1998). Conditional sentences: Courts of Appeal debate the principles. *Criminal Reports (5th)*, 15, 176–200.
- Manson, A. (2001). The Conditional Sentence: A Canadian approach to sentencing reform, or doing the time warp again. *Criminal Law Quarterly*, 44(3), 375.
- Manson, A., Healy, P., Trotter, G., Roberts, J. V., & Ives, D. (2016). *Sentencing and penal policy in Canada: Cases, materials, and commentary* (Third). Emond Montgomery Publications.
- Marinos, V. (2006). The Meaning of “Short” Sentences of Imprisonment and Offences Against the Administration of Justice: A Perspective from the Court. *Canadian Journal of Law & Society*, 21(2), 143–167.
- Marinos, V., & Doob, A. N. (1999). Understanding public attitudes toward conditional sentences of imprisonment. *Criminal Reports (5th)*, 21, 31–41.
- Martinson, R. (1974). What works? Questions and answers about prison reform. *The Public Interest*, 35, 22–54.
- Maruna, S. (2010). Mixed Method Research in Criminology: Why Not Go Both Ways? In A. R. Piquero & D. Weisburd (Eds.), *Handbook of Quantitative Criminology* (123–140). Springer New York.
- Mason, G. (2008, February 14). B.C. Judges: Compassionate, or lenient beyond reason? *Globe and Mail*.
- Mazey, E. (2002). Conditional sentence under house arrest. *Criminal Law Quarterly*, 46(2), 246.
- McLellan, M. F. (2011). The prospective devitalization of conditional sentences. *Criminal Law Quarterly*, 57, 265–283.
- McMahon, M. (1990). “Net-widening”: Vagaries in the use of a concept. *The British Journal of Criminology*, 30(2), 121–149.
- Mears, D. P., Cochran, J.C., & Bales, W.D. (2012). Gender differences in the effects of prison on recidivism. *Journal of Criminal Justice*, 40, 370–378.
- Miethe, T. D., Lu, H., & Reese, E. (2000). Reintegrative shaming and recidivism risks in drug court: Explanations for some unexpected findings. *Crime & Delinquency*, 46, 522–541.

- Miladinovic, Z. (2019). *Adult criminal and youth court statistics in Canada, 2016/2017* (Juristat: Canadian Centre for Justice Statistics No. 85-002-X; p. 12). Statistics Canada.
- Miller, M. L., & Chanenson, S. L. (2009). Shaping Modern Sentencing: Three Giants. *Federal Sentencing Reporter*, 21, 227–234.
- Ministry of Public Safety and Solicitor General. (2017). *A Profile of BC Corrections: Reduce Reoffending, Protect Communities—2017* (p. 36). Ministry of Public Safety and Solicitor General.
- Morris, N., & Tonry, M. (1990). *Intermediate sanctions: Between prison and probation*. Oxford University Press.
- Mosley, R. (2014). *Canadian Sentencing Policy—A look back*. Paper presented at ISRCL Conference, June 2014, Vancouver, BC.
- Mulgrew, I. (2020, July 27). Facing the twin crises of justice. *Vancouver Sun*, A1–A2.
- Myers, N. M. (2015). Who said anything about justice? Bail court and the culture of adjournment. *Canadian Journal of Law and Society*.
<https://doi.org/10.1017/cls.2014.28>
- Nagin, D. S., Cullen, F. T., & Jonson, C. L. (2009). Imprisonment and reoffending. In *Crime and Justice: A review of research* (Vol. 38). University of Chicago Press.
- Nieuwbeerta, P., Nagin, D. S., & Blokland, A. A. (2009). Assessing the impact of first-time imprisonment on offenders' subsequent criminal career development: A matched sample comparison. *Journal of Quantitative Criminology*, 25, 227–257.
- North, D. (2001). The “Catch 22” of conditional sentencing. *Criminal Law Quarterly*, 44(3), 342.
- North, D. M. (2002). *Imprisonment without incarceration: Bill C-41, the Supreme Court, and the challenges of conditional sentencing* (MA Thesis) Simon Fraser University.
- Office of the Auditor General of Ontario. (2014). *Annual Report of the Office of the Auditor General of Ontario* (p. 292). Office of the Auditor General of Ontario.
http://www.auditor.on.ca/en/content/annualreports/arreports/en14/2014AR_en_web.pdf
- Paciocco, D. M. (2015). The law of minimum sentences: Judicial responses and responsibilities. *Canadian Criminal Law Review*, 19(March), 173.
- Paciocco, D.M. The Honourable Justice. *Questionnaire for Judicial Appointment* (Ontario Court of Appeal). Accessed Nov. 7, 2019: https://www.canada.ca/en/departement-justice/news/2017/04/the_honourable_justicedavidmpacioccosquestionnaire.html

- Paciocco, D. M., & Roberts, J. V. (2005). *Sentencing in cases of impaired driving causing bodily harm or impaired driving causing death, with a particular emphasis on conditional sentencing*. Canada Safety Council.
- Palmer, T. (1992). *The re-emergence of correctional intervention*. Sage Publications.
- Parkes, D. (2012). From *Smith* to *Smickle*: The Charter's minimal impact on mandatory minimum sentences. *Supreme Court Law Review* (2d), 57, 149–172.
- Parkes, Debra [@DebraParkes]. (2021, February 18). [Y]es...more people will get conditional sentences (house arrest) but we desperately need progressive folks... [Tweet]. Twitter. <https://twitter.com/DebraParkes/status/1362517266215014403>
- Parliamentary Information and Research Service. (2012). *Legislative summary of Bill C-10*. Library of Parliament.
- Pate, C. M. The Honourable Senator for Ontario. (2021) Statement: *Bill C-22 aims to do justice for some, not all* (February 18, 2021).
- Pate, Kim [@KPateontheHill]. (2021, February 23). 9 in 10 [Canadians] want judges to have authority to not impose MMPs... [Tweet]. Twitter. <https://twitter.com/KPateontheHill/status/1364226845827244038>
- Pomerance, R. M. (2013). The New Approach to Sentencing in Canada: Reflections of a Trial Judge. *Canadian Criminal Law Review*, 17(3), 305–326.
- Provincial Court of BC Annual Report 2018/2019*. (2019). Provincial Court of BC. <https://www.provincialcourt.bc.ca/downloads/pdf/AnnualReport2018-2019.pdf>
- Public Safety Canada. (1997). *Corrections population growth: First report on progress for Federal/Provincial/Territorial Ministers Responsible for Justice* (p. 27). Public Safety Canada.
- Public Safety Canada. (2000). *Corrections population report: Fourth edition* (Final). Public Safety Canada.
- R. v. Amhaz*, 2013 BCCA 348
- R. v. Bankay*, 2010 ONCA 799
- R. v. Boudreault*, 2018 SCC 58
- R. v. Brady*, 1998 ABCA 7
- R. v. Calliou*, 2019 ABCA 365
- R. v. Carillo*, 2015 BCCA 192

R. v. Chartier, 2007 ONCA 706

R. v. Franklin, 2001 BCSC 706

R. v. Galang, 2014 BCPC 0240

R. v. Gill, 2013 BCCA 320

R. v. Gillespie, 2015 BCCA 290

R. v. Hanna, 2013 ABCA 134

R. v. Herrell, 2014 BCCA 114

R. v. Higgins, 2001 MBCA 177

R. v. Ivanic, 2011 BCCA, 158

R. v. Kory, 2009 BCCA 146

R. v. Jacobs, 2020 BCCA 287

R. v. Lavellee, 2011 BCCA 531

R. v. Lea, 2010 MBCA 37

R. v. Madden (12 Oct 2017), New Westminster 78944-2 (BC Prov Ct) unreported

R. v. Makar, 2000 MBCA 69

R. v. Merkuratsuk, 2012 NLTD(G) 11

R. v Morris, 2018 ONSC 5186

R. v. Nault, 2002 CarswellOnt 1693

R. v. Neary, 2017 SKCA 29

R. v. Nguyen, 2007 BCPC 386

R. v. Nguyen, 2008 BCCA 252

R. v. Oates, 2015 BCCA 259

R. v. Polywjanyj (1982), 1 C.C.C. (3d) 161 (Ont. C.A.)

- R. v. Proulx*, 2000 SCC 5
- R. v. Safarzadeh-Markali*, 2016 SCC 14
- R. v. Sawh*, 2016 ONSC 7797
- R. v. Schneider*, 2019 BCCA 310
- R. v. Sharma*, 2018 ONSC 1141
- R. v. Sharma*, 2020 ONCA 0478
- R. v. Smith*, 2017 BCCA 112
- R. v. Summers*, 2014 SCC 26
- R. v. Talman*, 2005 BCCA 279
- R. v. Taylor*, 2010, MBCA 103
- R. v. Tran*, 2017 SCC 5
- R. v. Voong*, 2015 BCCA 285
- R. v. Wismayer*, 1997 CarswellOnt 969 (ONCA)
- R. v. Wu*, (2003) 3 SCR 530
- R. v. Wust*, 2000 SCC 18
- Reed, M., & Morrison, P. (1997). *Adult correctional services in Canada, 1995-96* (Juristat No. 85-002-XPE Vol. 17 no. 4; p. 13). Statistics Canada.
- Reed, M., & Roberts, J. V. (1999). *Adult correctional services in Canada, 1997-98* (Juristat No. 85-002-XIE Vol. 19 no. 4; p. 14). Statistics Canada.
- Reid, A. A. (2014). Revisiting Leniency: An Intra-Provincial Study of Sentencing Variation in British Columbia. *Canadian Criminal Law Review*, 18(1), 39–56.
- Reid, A. A. (2017). The (Differential) Utilization of Conditional Sentences among Aboriginal Offenders in Canada. *Canadian Criminal Law Review*, 22(2), 133.
- Reid, A. A., & MacAlister, D. (2018). Extending a Geographical Perspective to the Study of Jurisdictional Consistency in Sentencing Outcomes. *The British Journal of Criminology*, 58(5), 1147–1170.

- Reid, A. A., & Roberts, J. V. (2019). Revisiting the conditional sentence of imprisonment after 20 years: Is community custody now an endangered species? *Canadian Criminal Law Review*, 24(1), 1–37.
- Renwick, G. P. (2008). Conditional acceptance of the conditional sentence. *Canadian Criminal Law Review*, 12(Sept), 227.
- Report of the Canadian Committee on Corrections. (1969). *Towards Unity: Criminal Justice and Corrections* (p. 517). Queen's Printer (Ouimet Report).
- Roach, K. (2000). Changing punishment at the turn of the century: Restorative justice on the rise. *Canadian Journal of Criminology*, 42(3), 249–280.
- Roberts, J. V. (1997). Conditional sentencing: Sword of Damocles or Pandora's Box? *Canadian Criminal Law Review*, 2, 183–204.
- Roberts, J. V. (1999a). Recent correctional trends: Good and bad news. *Justice Report*, 14(2), 10–11.
- Roberts, J. V. (1999b). Sentencing Trends and Sentencing Disparity. In J. V. Roberts & D. P. Cole (Eds.), *Making Sense of Sentencing* (137–159). University of Toronto Press.
- Roberts, J. V. (1999c). The hunt for the paper tiger: Conditional sentencing after Brady. *Criminal Law Quarterly*, 42, 38–66.
- Roberts, J. V. (2002). The evolution of conditional sentencing: An empirical analysis. *Criminal Reports (6th)*, 3, 267.
- Roberts, J. V. (2004). *The virtual prison: Community custody and the evolution of imprisonment*. Cambridge University Press.
- Roberts, J. V. (2006). Reforming conditional sentencing: Evaluating recent legislative proposals. *Criminal Law Quarterly*, 52, 18–27.
- Roberts, J. V., Antonowicz, D., & Sanders, T. (2000). *Conditional sentences of imprisonment: An empirical analysis of optional conditions*. Department of Justice Canada.
- Roberts, J. V., & Bebbington, H. H. (2013). Sentencing Reform in Canada: Promoting a Return to Principles and Evidenced-based Policy. *Canadian Criminal Law Review*, 17(3), 327–347.
- Roberts, J. V., Crutcher, N., & Verbrugge, P. (2007). Public Attitudes to Sentencing in Canada: Exploring Recent Findings. *Canadian Journal of Criminology & Criminal Justice*, 49(1), 75–107.

- Roberts, J. V., Doob, A. N., & Marinos, V. (2000). *Judicial attitudes to conditional terms of imprisonment: Results of a national survey*. Department of Justice Canada.
- Roberts, J. V., & Gabor, T. (2003). The impact of conditional sentencing: Decarceration and widening of the net. *Canadian Criminal Law Review*, 8(June), 33–49.
- Roberts, J. V., & Gabor, T. (2004). Living in the shadow of prison: Lessons from the Canadian experience in decarceration. *British Journal of Criminology*, 44, 92–112.
- Roberts, J. V., Hutchison, C., & Jesseman, R. (2005). Supervising conditional sentence orders: The perceptions and experiences of probation officers in Ontario. *Criminal Reports (6th)*, 29, 107–119.
- Roberts, J. V., & La Prairie, C. (2000). *Conditional sentencing in Canada: An overview of research findings* (Research No. RR2000-6e; p. 45). Department of Justice Canada.
- Roberts, J. V., & Manson, A. (2004). *The future of conditional sentencing: Perspectives of appellate judges*. Department of Justice Canada, Research and Statistics. http://www.justice.gc.ca/eng/rp-pr/csj-sjc/ccs-ajc/rr04_8/rr04_8.pdf
- Roberts, J. V., & Reid, A. (2017). Aboriginal Incarceration in Canada since 1978: Every Picture Tells the Same Story. *Canadian Journal of Criminology and Criminal Justice*, 59(3), 1–32.
- Roberts, J. V., & von Hirsch, A. (1998). Conditional sentences of imprisonment and the fundamental principle of proportionality in sentencing. *Criminal Reports (5th)*, 10, 222–231.
- Roberts, J. V., & von Hirsch, A. (1999). Legislating the purpose and principles of sentencing. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (48–62). University of Toronto Press.
- Rodrigues, G. P. (2016-3). *Crankshaw's Criminal Code of Canada: Legislative histories*-s. 742.1 (WestlawNext.CANADA).
- Ruby, C. C. (1999). Foreword. In J. V. Roberts & D. P. Cole (Eds.), *Making sense of sentencing* (vii–viii). University of Toronto Press.
- Rudnicki, Chris [@chrisrudnicki_]. (2021, February 18). *This is a really big deal. Parliament is breathing new life into the conditional sentence regime...* [Tweet]. Twitter. https://twitter.com/chrisrudnicki_/status/1362478475450462214
- Ryberg, J., & Roberts, J. V. (2014). Exploring the normative significance of public opinion for state punishment. In J. Ryberg & J. V. Roberts (Eds.), *Popular punishment; On the normative significance of public opinion* (1–13). Oxford University Press.

- Sanders, T., & Roberts, J. V. (2000). Public attitudes toward conditional sentencing: Results of a national survey. *Canadian Journal of Behavioural Science*. 32(4), 199–207.
- Sankoff, Peter [@petersankoff]. (2021, February 18). *You can argue that this is the best development in sentencing since conditional sentences were first enacted*. [Tweet]. Twitter. <https://twitter.com/petersankoff/status/1362488030804680705>
- Shanmuganathan, J. (2016). *R. v. Nur*: A positive step but not the solution to the problem of mandatory minimums in Canada. *Supreme Court Law Review* (2d), 76, 329–349.
- Sierra Systems. (2014). *Report to British Columbia Justice and Public Safety Sector: Technical assessment of electronic supervision (Final report)* (p. 60).
- Skelton, C. (2000, February 1). Sex offenders eligible for house arrest. *Vancouver Sun*, A6.
- Slinger, E., & Roesch, R. (2010). Problem-solving courts in Canada: A review and a call for empirically-based evaluation methods. *International Journal of Law and Psychiatry*, 33, 258–264.
- Snodgrass, G. M., Arjan A. J., Blokland, A. H., Nieuwbeerta, P., and Nagin, D. S. (2011). Does the time cause the crime? An examination of the relationship between time served and reoffending in the Netherlands. *Criminology*, 49(4), 1149–1194.
- Spohn, C., & Holleran, D. (2002). The effect of imprisonment on recidivism rates of felony offenders: A focus on drug offenders. *Criminology*, 40, 329–357.
- Statistics Canada. (1997). *Justice Spending in Canada 1994/1995* (Juristat: Canadian Centre for Justice Statistics No. 85-002-XPE no. 3; p. 13). Statistics Canada.
- Statistics Canada. Canadian Socio-Economic Information Management System (CANSIM).
- Statistics Canada. Canadian Socio-Economic Information Management System (CANSIM), using the CHASS Data Centre (University of Toronto).
- Statistics Canada. Table 35-10-0030-01 (formerly CANSIM 252-0056) Adult criminal courts, guilty cases by type of sentence; DOI: <https://doi.org/10.25318/3510003001-eng>
- Statistics Canada. Table 35-10-0031-01 (formerly CANSIM 252-0057) Adult criminal courts, guilty cases by most serious sentence; DOI: <https://doi.org/10.25318/3510003101-eng>

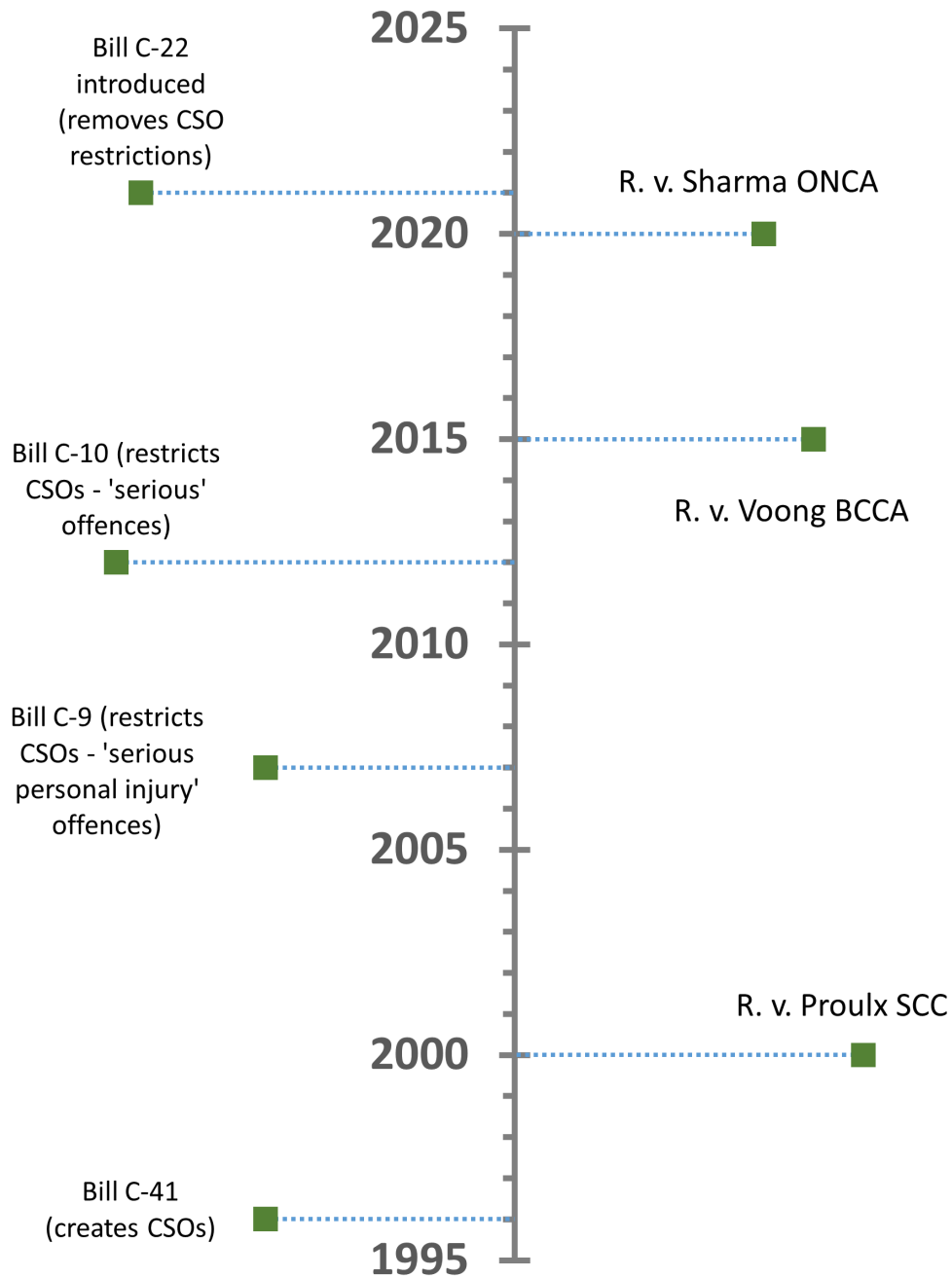
- Statistics Canada. Table 35-10-0014-01 (formerly CANSIM 251-0020) Adult admissions to correctional services; DOI: <https://www150.statcan.gc.ca/t1/tbl1/en/tv.action?pid=3510001401>
- Stephens, M. (2007). Lessons from the front lines in Canada's restorative justice experiment: The experience of sentencing judges. *Queen's Law Journal*, 33(1), 19.
- Sue, V., & Ritter, L. (2018). *Conducting Online Surveys* (2nd ed.). Sage Publications. <https://doi.org/10.4135/9781506335186>
- Sylvestre, M.-E. (2013). The (Re) Discovery of the Proportionality Principle in Sentencing in *Ipeelee*: Constitutionalization and the Emergence of Collective Responsibility. *Supreme Court Law Review* (2d), 63, 461–481.
- Sylvestre, M.-E. (2016). *"Moving towards a minimalist and transformative criminal justice system": Essay on the reform of the objectives and principles of sentencing*. Research and Statistics Division; Department of Justice Canada.
- Sylvestre, M.-E., Blomley, N., Damon, W., & Bellot, C. (2017). *Red zones and Other Spatial Conditions of Release Imposed on Marginalized People in Vancouver*. <https://doi.org/10.13140/RG.2.2.35261.36325>
- Taekema, S. (2018). Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice. *Law and Method*. <https://doi.org/10.5553/REM/000031>
- The Honourable Allan Rock. (1996). Keynote address: Crime, punishment and public expectations. *Public Perceptions of the Administration of Justice*. CIAJ Oct 11-14, 1995, Banff, Alberta.
- Tonry, M. (2011). Making peace, not a desert. *Criminology & Public Policy*, 10(3), 637–649.
- Tonry, M. (2014). Remodeling American sentencing: A ten-step blueprint for moving past mass incarceration. *Criminology & Public Policy*, 13, 503–533.
- Trahan, A., & Stewart, D. M. (2013). Toward a pragmatic framework for mixed-methods research in criminal justice and criminology. *Applied Psychology in Criminal Justice*, 9(1), 59–74.
- Van de Rakt, M., Murray, J., & Nieuwbeerta, P. (2012). The long-term effects of paternal imprisonment on criminal trajectories of children. *Journal of Research in Crime & Delinquency*, 49(1), 81–108.
- Vandersteen, L. (2016). Building a safety valve for mandatory minimums: How to construct a statutory exemption scheme. *Criminal Reports*, 27, 249.

- Varma, K. N., & Marinos, V. (2013). Three Decades of Public Attitudes Research on Crime and Punishment in Canada. *Canadian Journal of Criminology & Criminal Justice*, 55(4), 549–562.
- Visher, C. A., & Travis, J. (2003). Transitions from Prison to Community: Understanding Individual Pathways. *Annual Review of Sociology*, 29(1), 89–113.
- Walia, Harsha [@HarshaWalia]. (2021, February 18). *However, conditional sentences can quickly become a de facto pipeline to incarceration...*[Tweet]. Twitter. <https://twitter.com/HarshaWalia/status/1362465494943473671>
- Walmsley, R. (2018). *World prison population list (12th ed)* (p. 19). Institute for criminal policy research (ICPR). <https://www.prisonstudies.org/sites/default/files/resources/downloads/wppl12.pdf>
- Wasik, M. (1994). Sentencing guidelines: The problem of conditional sentences. *Criminal Justice Ethics*, 50–57.
- Weatherburn, D. (2010). The effect of prison on adult re-offending. *Crime and Justice Bulletin* (New South Wales, Bureau of Crime, Statistics, and Research) 143.
- Webster, C. M. (2004). Limits of Justice: The role of the criminal justice system in reducing crime. In B. Kidd & J. Phillips (Eds.), *Enforcement and Prevention to Civic Engagement: Research on community safety*. University of Toronto Press.
- Webster, C. M. (2006). *Understanding the Provincial criminal courts in Ontario: Methodological suggestions*. Report to the Court Services Division, Ministry of the Attorney General.
- Webster, C. M. (2014). *“Broken Bail” in Canada: How we might go about fixing it*. Research and Statistics Division; Department of Justice Canada.
- Webster, C. M., & Doob, A. N. (2007). Punitive Trends and Stable Imprisonment Rates in Canada. *Crime & Justice*, 36, 297–369.
- Webster, C. M., & Doob, A. N. (2012a). Maintaining our balance: Trends in imprisonment policies in Canada. In K. Ismaili, J. B. Sprott, & K. Varma (Eds.), *Canadian Criminal Justice Policy: Contemporary Perspectives* (79–109). Oxford University Press.
- Webster, C. M., & Doob, A. N. (2012b). Searching for Sasquatch: Deterrence of crime through sentence severity. In J. Petersilla & K. R. Reitz (Eds.), *Oxford handbook on sentencing and corrections* (173–195). Oxford University Press.
- Webster, C. M., & Doob, A. N. (2014). Penal reform “Canadian style”: Fiscal responsibility and decarceration in Alberta, Canada. *Punishment & Society*, 16(1), 3–31.

- Webster, C. M., & Doob, A. N. (2015). US punitiveness “Canadian style”? Cultural values and Canadian punishment policy. *Punishment & Society*, 17(3), 299–321.
- Webster, C. M., & Doob, A. N. (2018). Penal optimism: Understanding American mass imprisonment from a Canadian perspective. In K. R. Reitz (Ed.), *American exceptionalism in crime and punishment* (121–178). Oxford University Press.
- Webster, C. M., & Doob, A. N. (2019a). Missed opportunities: A postmortem on Canada’s experience with the conditional sentence. *Law and Contemporary Problems*, 82(1), 163–197.
- Webster, C. M., & Doob, A. N. (2019b). The will to change: Lessons from Canada’s successful decarceration of youth. *Law & Society Review*, 53(4), 1092.
- Webster, C. M., & Doob, A. N. (2020). Principles and politics: Sentencing and imprisonment policy in Canada (Ch. 17). In *Sentencing in Canada: Essays in law, policy and practice*. Irwin Law.
- Wilson-Raybould, J., Pate, K., & Thomas Bernard, Wanda. (2021, February 23). Bill C-22 is inadequate for the task of addressing injustice in Canada’s justice system. *Globe and Mail*. <https://www.theglobeandmail.com/opinion/article-bill-c-22-is-inadequate-for-the-task-of-addressing-injustice-in/>
- Yalkin, T. R., & Kirk, M. (2012). *The fiscal impact of changes to eligibility for conditional sentences of imprisonment in Canada* (p. 89). Office of the Parliamentary Budget Officer.
- Ye, J. (2006). *Overcoming challenges to conducting online surveys*. 83–89. <https://doi.org/10.4018/978-1-59140-792-8.ch008>

Appendix A.

Timeline of key events (legislation/cases)



Appendix B.

Conditional Sentence of Imprisonment – s. 742.1

CRANKSHAW-HIST 742.1

Crankshaw's *Criminal Code of Canada*⁶⁵⁵

Legislative Histories - Gary P. Rodrigues

Criminal Code - S. 742.1

742.1 — History

Statutory Reference: R.S.C. 1985, c. C-46, s. 742.1

An Act to Amend the *Criminal Code* (sentencing), etc., S.C. 1995, c. 22

Section 742.1 was enacted by S.C. 1995, c. 22, s. 6 as follows:

742.1

Imposing of conditional sentence — Where a person is convicted of an offence, except an offence that is punishable by a minimum term of imprisonment, and the court

- (a) imposes a sentence of imprisonment of less than two years, and
- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community.

the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's complying with the conditions of a conditional sentence order made under section 742.3.

Criminal Law Improvement Act, 1996, S.C. 1997, c. 18

Section 742.1 was amended by S.C. 1997, c. 18, s. 107.1 by replacing 742.1(b) with the following:

- (b) is satisfied that serving the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and

⁶⁵⁵ Rodrigues, G. P. (2016-3). *Crankshaw's Criminal Code of Canada: Legislative histories- s. 742.1* (WestlawNext.CANADA). Retrieved September 4th, 2019, from [https://nextcanada.westlaw.com/Document/I10b717dd93e063f0e0440003ba0d6c6d/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=\(sc.Category\)](https://nextcanada.westlaw.com/Document/I10b717dd93e063f0e0440003ba0d6c6d/View/FullText.html?originationContext=document&transitionType=DocumentItem&contextData=(sc.Category))

principles of sentencing set out in sections 718 to 718.2.

An Act to amend the Criminal Code (conditional sentence of imprisonment), S.C. 2007, c. 12

Section 742.1 was replaced by the following (S.C. 2007, c. 12, s. 1; in force November 30, 2007):

742.1

Imposing of conditional sentence — If a person is convicted of an offence, other than a serious personal injury offence as defined in section 752, a terrorism offence or a criminal organization offence prosecuted by way of indictment for which the maximum term of imprisonment is ten years or more or an offence punishable by a minimum term of imprisonment, and the court imposes a sentence of imprisonment of less than two years and is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the offender's compliance with the conditions imposed under section 742.3.

Safe Streets and Communities Act, S.C. 2012, c. 1

Section 742.1 was replaced by the following (S.C. 2012, c. 1, s. 34; in force November 20, 2012):

742.1

Imposing of conditional sentence — If a person is convicted of an offence and the court imposes a sentence of imprisonment of less than two years, the court may, for the purpose of supervising the offender's behaviour in the community, order that the offender serve the sentence in the community, subject to the conditions imposed under section 742.3, if

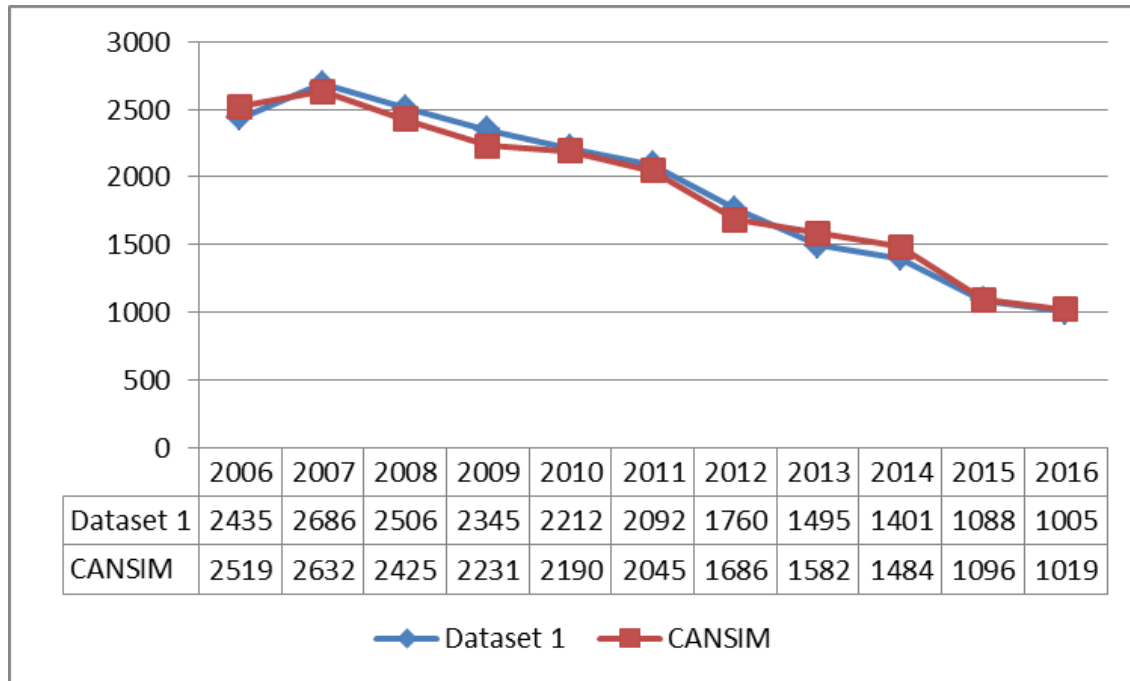
- (a) the court is satisfied that the service of the sentence in the community would not endanger the safety of the community and would be consistent with the fundamental purpose and principles of sentencing set out in sections 718 to 718.2;
- (b) the offence is not an offence punishable by a minimum term of imprisonment;
- (c) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 14 years or life;
- (d) the offence is not a terrorism offence, or a criminal organization offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years or more;
- (e) the offence is not an offence, prosecuted by way of indictment, for which the maximum term of imprisonment is 10 years, that

- (i) resulted in bodily harm,
 - (ii) involved the import, export, trafficking or production of drugs, or
 - (iii) involved the use of a weapon; and
- (f) the offence is not an offence, prosecuted by way of indictment, under any of the following provisions:
- (i) section 144 (prison breach),
 - (ii) section 264 (criminal harassment),
 - (iii) section 271 (sexual assault),
 - (iv) section 279 (kidnapping),
 - (v) section 279.02 (trafficking in persons - material benefit),
 - (vi) section 281 (abduction of person under fourteen),
 - (vii) section 333.1 (motor vehicle theft),
 - (viii) paragraph 334(a) (theft over \$5,000),
 - (ix) paragraph 348(1)(e) (breaking and entering a place other than a dwelling-house),
 - (x) section 349 (being unlawfully in a dwelling-house), and
 - (xi) section 435 (arson for fraudulent purpose).

Appendix C.

Validation of court dataset⁶⁵⁶

Figure C-1 Comparison: Dataset 1 v CANSIM/COURTS – BC- fines - count (#)



⁶⁵⁶ Results for the three matched sanctions (fines, jail, conditional sentences) suggest considerable consistency in terms of overall counts. Observed differences are consistent over time and likely reflect the ICCS reported undercount of drug offences. Note: Dataset 1 is organized by calendar year; the CANSIM dataset is organized by fiscal year. For the sake of comparisons, 2006/2007 is compared to the calendar year 2006.

Figure C-2 BC – Comparison – Dataset 1 v CANSIM – jail - count (#)

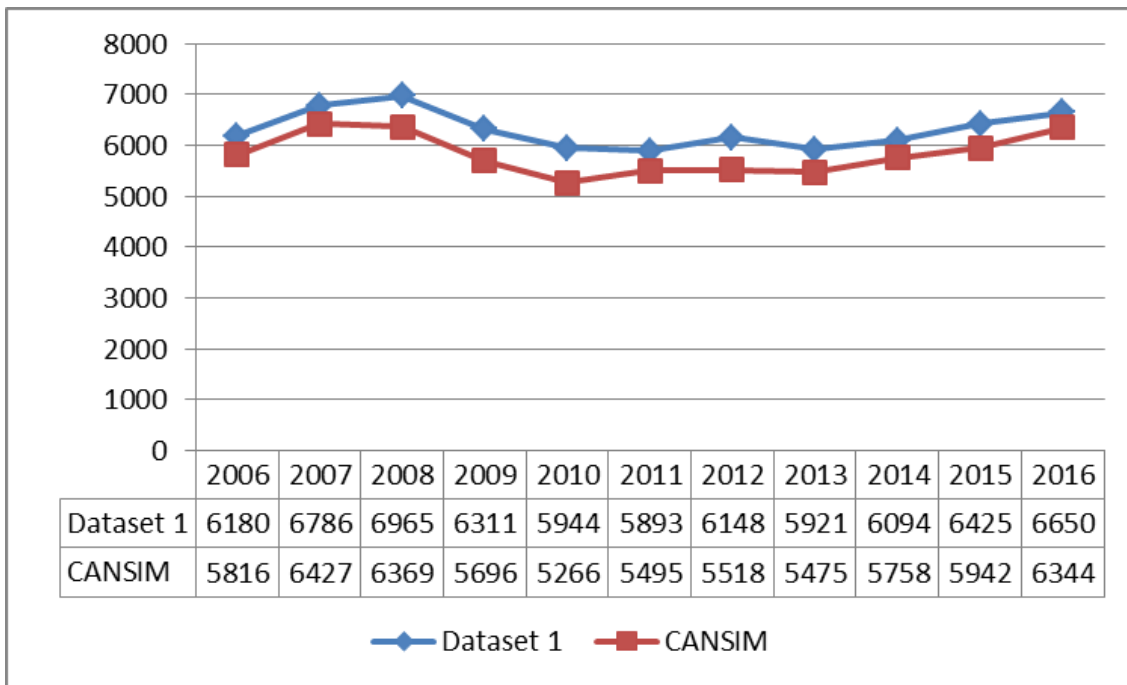
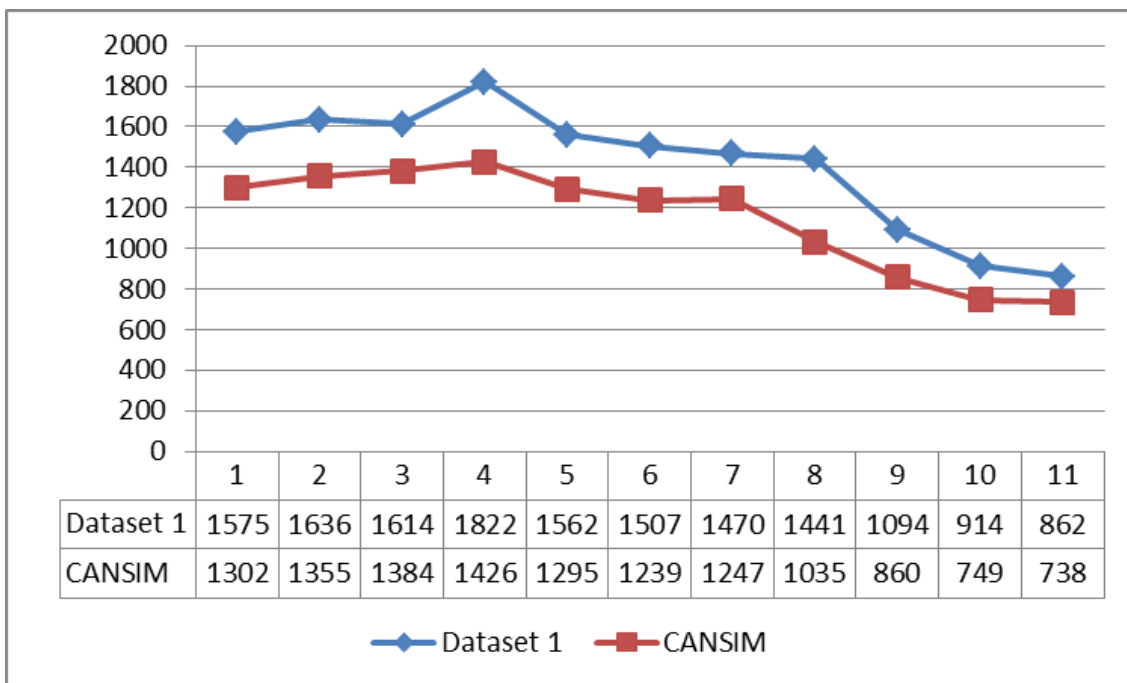


Figure C-3 BC – Comparison – Dataset 1 v CANSIM – CSOs - count (#)



Appendix D.

Online survey – text

Instructions:

Thank you for participating in this survey. All responses are anonymous; no identifying information will be requested or collected.

Please respond to the following [20] questions. You will be invited to add comments to expand on or clarify your responses at the end of the survey.

Note: Conditional sentences have been available as a sentencing option since 1996. For the purposes of this survey you are asked to provide your current perspectives, though you are welcome to comment on earlier views in the space provided.

- 1) What do you consider to be the single most important objective of conditional sentences?
- 2) In your opinion, have conditional sentences reduced the number of offenders sent to custody in your court?
 - a) Definitely yes _____
 - b) Probably yes _____
 - c) Probably not _____
 - d) Definitely not _____
 - e) I don't know _____

Note: The following five (5) questions ask you to compare conditional sentences to traditional terms of imprisonment in terms of their ability to achieve various sentencing goals. Each question starts the same – “Do you find that you are able to set conditions for a conditional sentence that are as effective as a normal sentence of imprisonment in...” and then asks you to focus on a specific objective or principle (e.g., deterrence, denunciation, etc.).

- 3) Do you find that you are able to set conditions for a conditional sentence that are as effective as a normal sentence of imprisonment in... **denouncing** unlawful conduct?
 - a) Always _____
 - b) Usually _____
 - c) Sometimes _____
 - d) Almost never _____
 - e) Never _____

- 4) Do you find that you are able to set conditions for a conditional sentence that are as effective as a normal sentence of imprisonment in... **detering** the offender and other persons from committing offences?
- a) Always _____
 - b) Usually _____
 - c) Sometimes _____
 - d) Almost never _____
 - e) Never _____
- 5) Do you find that you are able to set conditions for a conditional sentence that are as effective as a normal sentence of imprisonment in assisting in... the **rehabilitation** of offenders?
- a) Always _____
 - b) Usually _____
 - c) Sometimes _____
 - d) Almost never _____
 - e) Never _____
- 6) Do you find that you are able to set conditions for a conditional sentence that are as effective as a normal sentence of imprisonment in assisting in... providing **reparations** for harm done to the victim or to the community?
- a) Always _____
 - b) Usually _____
 - c) Sometimes _____
 - d) Almost never _____
 - e) Never _____
- 7) Do you find that you are able to set conditions for a conditional sentence that are as effective as a normal sentence of imprisonment in... ensuring that the sentence is **proportionate** to the gravity of the offence and the degree of responsibility of the offender?
- a) Always _____
 - b) Usually _____
 - c) Sometimes _____
 - d) Almost never _____
 - e) Never _____
- 8) Do you believe you receive adequate guidance from the Courts of Appeal on the use of conditional sentences? (yes/no; why or why not)
- 9) Would you be inclined to use conditional sentences more frequently if there were more community and/or supervisory resources? (yes/no)

- 10) If yes, what more is needed?
- 11) When imposing a conditional sentence, how often do you include conditions of house arrest and/or curfew?
- a) Always _____
 - b) Often _____
 - c) Occasionally _____
 - d) Rarely _____
 - e) Never _____
- 12) When imposing house arrest on a conditional sentence do you regularly include electronic monitoring? (yes/no; why or why not?)
- 13) Do you think that a conditional sentence has a different impact on an offender than a probation order with the same conditions?
- a) Definitely yes _____
 - b) Probably yes _____
 - c) Probably not _____
 - d) Definitely not _____
 - e) I don't know _____
- 14) In your opinion what are the most important differences between the breach provisions for conditional sentence orders (s.742.6 CCC) and the revocation provisions for suspended sentences (s.732.2(5) CCC)?
- 15) What do you consider to be the main benefits of conditional sentencing?
- 16) What do you consider to be the main challenges of conditional sentencing?
- 17) In your opinion are there offences or offenders for which conditional sentences are particularly well suited? If so, what types of offences or offenders would you identify?
- 18) In your opinion are there offences or offenders for which conditional sentences are particularly unsuited? If so, what types of offences or offenders would you identify?
- 19) Do you think it would be beneficial for judges to receive information about sentence 'outcome' once a sentence has been completed? This could include, for example, information regarding levels of supervision, program completion, and compliance with conditions. (yes/no/I don't know)
- 20) How has your utilization of conditional sentences been impacted by the restrictions introduced in 2012 by the *Safe Streets & Communities Act* (Bill C-10)?

If you have any additional comments about conditional sentences, please note them below:

Thank you for completing this survey. If you are interested in participating in a brief interview on this topic, please e-mail the researcher directly (xxxxx@xxx).

Participation is voluntary; participants will not be identified; interviews will be arranged at your convenience.

Background information (for survey participants):

Current status: Regular/fulltime ____ Senior/part-time ____

Current assigned region:

Vancouver ____ Fraser ____ Interior ____ Island ____ North ____

Number of years sitting as a judge:

0-5 ____ 6-10 ____ 11-15 ____ 16-20 ____ 20+ ____

Appendix E.

Interview – Form B - Information & consent form

Project (working title): PhD thesis – Conditional sentencing at the crossroads
Principal Investigator: Dawn North, School of Criminology, Simon Fraser University
Contact information: xxxxxx@sfu.ca; cell # xxx xxx-xxxx
Faculty Supervisor: David MacAlister; xxxxxxxxx@sfu.ca xxx xxx-xxxx

Background: This research project is intended to satisfy PhD thesis requirements.

Purpose: This study will examine conditional sentences (Bill C-41; 1996) in terms of their effect on overall sentencing patterns and will include a consideration of the consequences of restrictions introduced in 2012 by Bill C-10.

Voluntariness: Your participation is strictly voluntary, and you may choose to withdraw at any point. There is no compensation, financial or otherwise, for participating in this research.

Structure: Participation includes an interview of approximately one hour, scheduled at a time and location of your convenience. Subject to your agreement, the interview will be audio-recorded to ensure accuracy. Participants will be given the opportunity to review transcripts to ensure accuracy in transcription; once confirmed the audio recording will be destroyed.

Risks: There are no foreseeable risks for participants.

Benefits: Including the perspectives of judges in legal research promotes a more informed understanding of sentencing issues and provides an opportunity for these critical front-line decision makers to contribute to the ongoing discussion regarding the future of conditional sentencing.

Confidentiality: Participants will not be identified as part of this study. Audio tapes will be destroyed upon transcription and transcripts will be attributed to pseudonyms only. During analysis and upon project completion all data will be securely stored on an external hard drive kept in a locked cabinet in the investigator's private office.

Future use of participant data: The results of this study will be reported in a graduate (PhD) thesis and may also be published in journal articles and books.

If you have any concerns about your rights as a research participant and/or your experiences while participating in this study, you may contact xxxx, Director, SFU Office of Research Ethics, xxxxx@sfu.ca or xxx- xxx-xxxx

Reviewed with participant (signed by investigator)

Date

Participant ID:

Appendix F.

Interview schedule for judges

This is a semi-structured interview and the questions asked to the participants may not be in the order of this interview schedule. Depending upon responses given by the participant, additional follow-up questions may be asked for clarification.

Review of Form B “Information & consent form for interview participants – Judges” ☐

Date of interview: _____

Background information:

How many years have you been a judge?

0-5 ☐ 6-10 ☐ 11-15 ☐ 16-20 ☐ 20+ ☐

Assigned region? Vancouver ☐ Fraser ☐ Interior ☐ Island ☐ North ☐

Current status: Regular/full-time ☐ Senior/part-time ☐ Retired _____

- 1) Conditional sentences have evolved considerably since their introduction in 1996. How would you describe the current goals and application of conditional sentences?

The following question does not ask you to comment on the merits or effect of government policy. It is intended to focus on the goals of conditional sentencing and your sense of how effectiveness could be measured.

- 2) In your opinion what measures would be relevant to an assessment of conditional sentence effectiveness?
- 3) When considering the imposition of a conditional sentence are there areas where you would prefer additional information? If so, what type of information would assist you?
- 4) How would you compare conditional sentences and suspended sentences in terms of their ability to address deterrence and denunciation?

The following question is not asking you to comment on your decision-making process in any way that could call into question your impartiality in future hearings.

- 5) When making a decision on sentence to what extent do you focus on problem-solving?

- 6) What has been your experience with the breach provisions for conditional sentences and the revocation provisions for suspended sentences?
- 7) Has your utilization of suspended sentences evolved over time?

In a national survey done in 1998 judges were asked for their opinions on conditional sentencing, which was then a new sanction. When comparing the responses from BC judges then (1998) to the responses received in the current survey, several changes were noted, including:

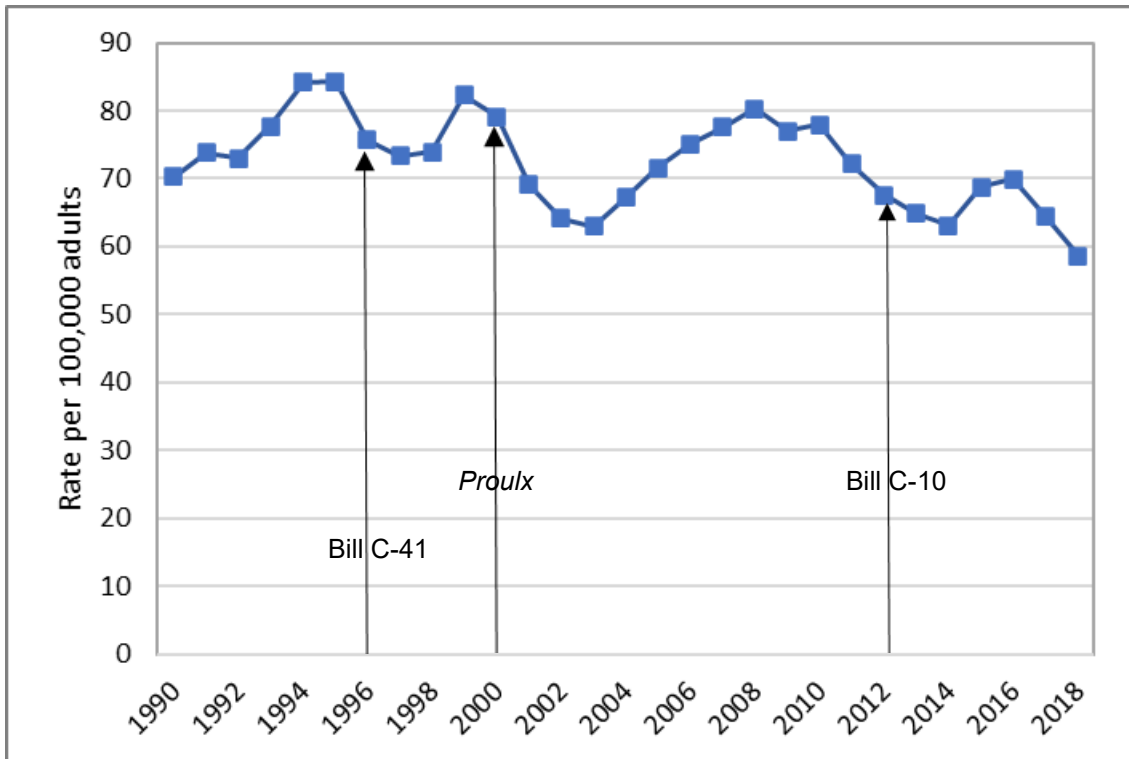
- 8) Judges in 2018 were more likely to identify deterrence and denunciation as primary objectives of conditional sentencing.
- 9) Judges in 2018 were more likely to say that a conditional sentence has a greater impact on an offender than a probation order with the same conditions.

What would you attribute these shifts to?

Appendix G.

BC – Provincial Incarceration Rate (1990-2018)

Figure G-1 BC – Provincial incarceration rate (per 100,000 adults)⁶⁵⁷



⁶⁵⁷ Source: Statistics Canada, Canadian Socio-Economic Information Management System (CANSIM), using the CHASS Data Centre (University of Toronto).